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ABSTRACT

This thirty-second edition of the "Yearbook" is a comprehensive reference to recent state appellate and federal court decisions that affect the operation, management, and governance of public elementary and secondary schools and higher education institutions in the United States. This edition includes all reported cases relevant to public schools decided during the 1981 calendar year up to and including all the December 1981 advance sheets, as well as any 1980 cases not reported in last year's edition. The book's chapters are "Governance" by Thomas N. Jones; "Employees" by Joseph C. Beckham; "Bargaining" by Hugh D. Jascourt; "Pupils" by Henry S. Lufler, Jr.; "Torts" by Paul W. Thurston; "Finance" by Richard A. Rossmiller; "Property" by Philip K. Piele and Margaret M. Johnson; and "Higher Education" by D. Parker Young and Donald D. Gehring. A table of cases and an index conclude the book. (MLF)

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THE YEARBOOK OF SCHOOL LAW 1982

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PREFACE

The Yearbook of School Law—now in its eleventh year of publication by the National Organization on Legal Problems of Education—provides an objective summary and analysis of the previous year's state appellate, and federal court decisions that affect the operation, management, and governance of public elementary and secondary schools and higher education institutions in the United States.

The 1982 *Yearbook* includes all cases relevant to public schools decided during the 1981 calendar year and reported in West's Regional, Federal, Snd Supreme Court Reports, up to and including all the December 1981 advance sheets, as well as any 1980 cases not reported in the 1981 *Yearbook*.

Only one major change was made in the contents of the *Yearbook* this year: the chapter on higher education returns after a six-year absence during which time a separate yearbook on higher education law edited by D. Parker Young was published by NOLPE. Although the amount of litigation in higher education has not diminished, it became too costly for NOLPE to publish a separate yearbook devoted entirely to higher education law. Fortunately, Professor Young consented to write the higher education chapter for the 1982 *Yearbook*. But because not all higher education law cases reported during the previous year could be included, Professor Young was asked to summarize only the more significant higher education cases.

The publication of the *Yearbook* continues to be the result of the combined efforts of a number of dedicated and talented people: the authors who again exhibited considerable writing skill and substantive expertise in preparing their chapters; Mary Cote and Donna Atto who helped proofread some of the chapters; Carol Pritchett who typed copy for much of the *Yearbook;* Darel Semler, director of services and attorney, who not only coordinated the production of the *Yearbook* but also prepared the subject index with the help of Karen Hesse, typesetting specialist. Janice Graham, Dee Slauson, and Mary Luna assisted with the preparation and proofreading of the table of cases and index.

Finally, I wish to express my deep sense of loss over the untimely death of a friend and colleague, Dr. M. A. "Mac" McGhehey, executive secretary of the National Organization on Legal Problems of Education from 1961 until his death in September 1982. Mac made an enormous contribution to the field of school law through his strong leadership of NOLPE and his teaching, speaking, and writing on school law. It was he who persuaded Lee O. Garber to let NOLPE produce the *Yearbook* beginning in 1972. Mac was Mr. School Law in this country. But it was Mac's personal qualities that I most admired and shall most remember about him: his wit, his humanity, his boundless energy and capacity for work, and his uncompromising standards of quality in legal writing.

Philip K. Piele, Editor

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1.0 INTRODUCTION

School board members, teachers and administrators must understand their legal rights and duties if they are to function efficiently in the school arena. In addition, they must comprehend the law to avoid personal liability for damages due to errors and omissions. This chapter will examine cases reported during 1981 which address the issue of school board governance. In addition to immunity cases, topics that will be covered include the legal issues involved in establishing school board policies, the powers and responsibilities of school boards, open meeting laws, school board member misconduct, school elections, school organization, and the legal aspects of transportation of students.

1.1 IMMUNITY OF SCHOOL BOARDS AND SCHOOL BOARD MEMBERS AND 42 U.S.C. § 1983

1.1a Sovereign Immunity

The Supreme Court of Appeals of West Virginia was asked to examine the doctrine of sovereign immunity as it relates to a county board of education in a dispute involving the misapplication of funds raised by a special county election that were intended to supplement the wages of county non-teaching school employees.[1]

The court held that the misuse of funds from the special levy was unlawful on the part of the board of education. The levy was held to raise money for a specific purpose, and when the board utilized that money to increase teachers' salaries, it stepped outside its scope of authority. The court also held that sovereign immunity was not available to the board in an action claiming improper expenditures of public funds. If the individual or agency charged with the expenditure of such funds fails to properly apply the money, the governmental entity is not entitled to assert the protection of sovereign immunity.

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[1] Thomas v. Board of Educ. McDowell Cty., 280 S.E.2d 816 (W. Va. 1981).

1.1b Scope of Municipal Immunity under 42 U.S.C. § 1983

During 1981, four significant cases were handed down by federal courts adding to the body of law regarding municipal liability under 42 U.S.C. § 1983.

In the first case, plaintiff filed a civil rights action in his capacity as administrator of his son's estate against two Illinois villages, a police chief, and eight individual city police officers.[2] The plaintiff, Roy Hamrick, based his claim on 42 U.S.C. § 1983. Plaintiff alleged that city police officers, acting pursuant to governmental policy or custom, forcibly entered his son's home without a warrant, chased him into the bathroom, smashed down the bathroom door, and shot the boy in the back of the head as he apparently tried to flush pills down the toilet. Hamrick's son died of his wounds one hour later. Both the villages and the police chief moved for dismissal of the complaint for failure to state a claim for which relief could be granted.

The federal district court ruled that while it is unnecessary to show formal, documented approval of a governmental custom or policy to state a claim under *Monell*,[3] it is necessary to allege more than a single incident of illegality as evidence of a governmental policy, custom, or practice to state a claim for relief. There must be a factual basis asserted for the plaintiff's claim that he was a victim of acts undertaken pursuant to a pattern or practice equivalent to unofficial authorization.

Hamrick alleged a single, wrongful incident—the asserted unconstitutional search and arrest of his son that resulted in his son's death—allegedly perpetrated pursuant to an official policy, custom, or practice of the two villages. The court held that plaintiff failed to allege the occurrence of similar incidents in those two municipalities so that, on the face of the complaint, it appeared that the plaintiff was attempting to state a claim against the villages solely on the basis of an isolated instance of police misconduct. The court held that a single instance of an individual police officer's misconduct, however reprehensible, if true, does not indicate systematic, city-supported abuses of the nature to which *Monell* makes reference. Accordingly, the court ruled that plaintiff's complaint failed to state a valid claim against the villages.

The chief of police of one of the villages moved to dismiss the complaint against him on the grounds that Hamrick had failed to state a claim upon which relief could be granted. The court stated that to establish liability against supervisory personnel under § 1983, there must be an affirmative link proven between their acts and omissions and the actions directly causing the alleged violation. The court held further that a successful plaintiff under § 1983 must prove malicious or reckless misconduct.[4] Hamrick had alleged a link between the chief's alleged acts and omissions and the events surrounding the death of his son. The court held that if the allegations in the complaint were true, more than mere negligence was involved. Thus, the allegations adequately stated a claim against the chief. Accordingly, the police chief's motion to dismiss was denied.

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[2] Hamrick v. Lewis, 515 F. Supp. 983 (N.D. Ill. 1981).

[3] Monell v. Department of Social Servs. of the City of New York, 436 U.S. 658 (1978).

The villages moved to strike Hamrick's request for punitive damages since they are local public entities under the Illinois Tort Immunity Act,[5] which provides that such public entities are not liable for punitive or exemplary damages. The court stated that the Seventh Circuit in *McLaughlin v. Tilendis*,[6] held that the Illinois Tort Immunity Act cannot protect defendants against a cause of action grounded, as here, on a federal statute. In the instant case, the court held that provided certain aggravated circumstances are shown, punitive damages are recoverable under federal law in § 1983 actions, even in the absence of actual loss to the plaintiff. Accordingly, the court denied the village's motion to strike the request for punitive damages.

One month after the federal district court decision in *Hamrick*, the United States Supreme Court addressed the issue of municipal liability for punitive damages under § 1983 in *City of Newport*.[7] Respondent, a Rhode Island corporation organized for the purpose of promoting musical concerts, received approval from the Rhode Island Department of Natural Resources to present several summer concerts at a state park located in Newport. In securing approval for the final concerts, the corporation sought and obtained an entertainment license from the city, which the city subsequently cancelled. The corporation then brought suit in federal district court alleging that the city's cancellation of its entertainment license amounted to a violation of its constitutitonal rights under color of state law. The corporation sought compensatory and punitive damages under § 1983.

Without objection, the district court instructed the jury to award punitive damages against the city. Verdicts were returned for the corporation, which in addition to receiving compensatory damages also received an award of punitive damages. The city moved for a new trial, arguing for the first time that punitive damages could not be awarded against a municipality under § 1983. The First Circuit Court of Appeals in affirming the district court decision held that there is a "distinct possibility" that municipalities could be liable for punitive damages under § 1983 in proper circumstances.[8] Because of the importance of the punitive damages issue, the U.S. Supreme Court granted certiorari.

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[4] *Accord*, Jamison v. McCurrie, 565 F.2d 483 (7th Cir. 1977).

[5] ILL. REV. STAT. ch. 85, § 1-101.

[6] 398 F.2d 287 (7th Cir. 1968).

[7] City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

In holding that a municipality is immune from punitive damages under § 1983, the Court stated that to conclude that Congress meant to incorporate a particular immunity as an affirmative defense in § 1983 litigation, a court must undertake careful inquiry into consideration of both history and public policy.

In 1871, when Congress enacted what is now § 1983, it was understood that a municipality was to be treated as a natural person subject to suit for a wide range of tortious activity, but this understanding did not extend to the award of punitive damages at common law. Indeed, common law courts consistently and expressly declined to award punitive damages against municipalities. The Court noted that nothing in the legislative history suggested that in enacting § 1 of the Civil Rights Act of 1871 Congress intended to abolish the doctrine of municipal immunity from punitive damages.

The Court also stated that considerations of public policy did not support exposing a city to punitive damages for the malicious or reckless conduct of its officials.[9]

A few months after the *City of Newport* decision was handed down, a similar set of facts was presented to a federal district court in Kansas.[10] However, in this case the action was based on § 1981 rather than § 1983. The sole issue before the district court was whether punitive damages may be awarded in a suit against a school district under a civil rights claim based on § 1981. The court concluded that even in light of the *City of Newport* decision, a school district could be liable for such damages under § 1981.

The court in the Kansas case noted that the legislative history and judicial treatment of §§ 1981 and 1983 have been discussed by the United States Supreme Court on numerous occasions. The court also noted that in its decision in *City of Newport*, the Court did not discuss § 1981, but relied exclusively on § 1983. It was also pointed out by the court that federal tribunals have traditionally treated the two statutes in question separately and distinctly.

The court therefore ruled that based upon the disparate treatment historically given municipalities under §§ 1981 and 1983, the different

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8. Fact Concerts, Inc. v. City of Newport, 626 F.2d 1060 (1st Cir. 1980).
9. City of Newport, 453 U.S. 247 (1981).
10. Boyd v. Shawnee Mission Pub. Schools, 522 F. Supp. 1115 (D. Kan. 1981).

goals and purposes reflected in the legislative histories of the two statutes, and the different constitutional bases for the two acts, it was not prepared to extend the holding of *City of Newport* to the facts of the Kansas case. Therefore, the court denied defendant's motion to strike the plaintiff's punitive damages claim under § 1981.

A decision handed down last term by the Supreme Court might indicate a tendency for the Court to limit the availability of the Fourteenth Amendment as grounds for certain kinds of suits against school boards and other agencies of the state. In a New Jersey case the Court held that a prisoner whose property was lost through the negligence of a state official did not have a constitutional claim for violation of his rights to due process since a state law tort remedy was available to redress the loss.[11]

Since the case involved only negligence, it seems likely that allegations of violations of teachers' and students' due process rights by intentional actions of school boards or administrators will continue to be susceptible to redress through § 1983 actions.

1.2 STATE BOARDS OF EDUCATION AND OTHER GOVERNMENTAL AGENCIES: SHARING THE AUTHORITY TO EDUCATE

A state board of education is either elected on a partisan or nonpartisan basis or is appointed by the governor. The extent of power of the state board varies greatly from jurisdiction to jurisdiction. The following cases decided in 1981 examine the legal basis and duties of the state board of education and the state commissioner of education.

1.2a State Commissioners of Education

In a New Jersey case, the lower court sustained an order of the commissioner of education, appointing and assigning a "monitor general" to act as a general supervisor of all activities undertaken by the Trenton Board of Education. The order providing for this action encompassed a "corrective action plan" that required the emplacement of the "monitor general" who was to report directly to the commissioner with respect to the total operation of the school district for the 1978-81 school years. Further elements of the corrective plan called for inservice training programs and the formation of a comprehensive plan for needed school facilities.

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[11] Parratt v. Taylor, 101 S. Ct. 1908 (1980).

The Supreme Court of New Jersey[12] held that the administrative measures at the heart of this litigation were extraordinary, but the problems that they sought to redress were equally extraordinary. The court stated that the actions of the commissioner were lawful and required by irrefutable exigency. It was established in the record that the educational system of Trenton was in an abysmal state, due almost entirely to the mismanagement of the members of the local board of education.

The court held that where the local boards fail to provide a thorough and efficient public education, state statutes[13] convey the authority to issue remedial plans to the state board of education. The court went on to state that the state board had the authority to delegate to the commissioner of education the power to assign a "monitor general" to come to the aid of a troubled local school board. The court concluded by stating that the sweep of the remedial power of the commissioner had been confirmed in past New Jersey decisions.[14]

The power to appoint the commissioner of education was at issue in another New Jersey case. A state statute[15] provides that the commissioner of education shall be appointed by the governor with the advice and consent of the senate. Plaintiffs challenged the validity of this statutory provision claiming that it violated the state constitution which plaintiff construed as reposing the appointment power exclusively in the state board of education. The court held that the statute calling for the governor to appoint the commissioner was constitutionally valid.[16]

1.2b State Boards of Education

Several cases reported last year dealt with the power of the state board of education in school district reorganization cases.

In a California case the California Court of Appeals held that the record disclosed the state board of education did not use its authority arbitrarily or capriciously in determining that the creation of a new unified school district would maximize educational opportunity for the area children.[17] The state board's reorganization plan was approved by the court despite the contention of the existing district that creation of the new district would substantially interfere with the quality and caliber of the existing district's academic programs. The court concluded that the exercise by the state board of its authority in school district reorganization matters is "quasi-legislative" in nature, and therefore not subject to judicial review.[18]

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[12] *In re* Trenton Bd. of Educ., 431 A.2d 808 (N.J. 1981).

[13] N.J. STAT. ANN. § 18A:79-1 (West).

[14] *In re* Application of the Bd. of Educ. of Upper Freehold Reg. School Dist., 430 A.2d 905 (1981).

[15] N.J. STAT. ANN. § 18A:4-21 (West).

[16] Boyd v. Byrne, 420 A.2d 1028 (N.J. Super. Ct. App. Div. 1980).

[17] Fullerton Joint Union High School Dist. v. State Bd. of Educ., 171 Cal. Rptr. 346 (Cal. Ct. App. 1981).

The only issue on appeal in another California case was whether the state board of education had discretion to deny a petition for the formation of a new school district where the petition meets the criteria guidelines established for review of such petitions in the state statutes. The appellate court held that the board did have the discretion to deny such a petition, even though said petition met all the statutory guidelines.[19]

In a Pennsylvania case, the court held that the state board did not abuse its power by delegating to the Council of Basic Education authority to review the evidence and make a recommendation concerning the transfer of an independent school district from one area school district to another.[20] The court also held that the board lawfully utilized that recommendation in coming to its decision to deny the proposed transfer. In addition, the court stated that there was no requirement that each member of the board personally review the application for transfer.

The Governor of Delaware proposed the following question to the state supreme court: Did the School District Reorganization Act of 1980[21] constitute an impermissible delegation of legislative power to the state board of education. The court held that (1) where the overwhelming consideration of the legislation in enacting the reorganization statute was that the plan adopted by the state board satisfy the demands of the federal courts, particularly that the plan adequately desegregate the student body, (2) where the legislature stated that the court-created district should be eliminated consistent with constitutional standards and state policy, and (3) where the legislature stated that the reorganized district must provide a complete instructional program for grades one through twelve, the state board was provided with adequate standards and guidelines for establishing school districts. Thus the statute was not an impermissible delegation of legislative power.[22]

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[18] *Accord*, Board of Educ. of Marion City School Dist. v. Board of Educ. of Elgin Local School Dist., 420 N.E.2d 990 (Ohio 1981). The court held that the state board's decision of disapproving the transfer of land from one school district to another is a legislative act not subject to review by the courts.

[19] Hamilton v. State Bd. of Educ., 172 Cal. Rptr. 748 (Cal. Ct. App. 1981).

[20] Independent School Dist. v. State Bd. of Educ., 417 A.2d 269 (Pa. Commw. Ct. 1980).

[21] 14 DEL. CODE ANN. § 1001(b).

[22] *See* Opinion of the Justices, 425 A.2d 604 (Del. 1981).

In a Georgia case, a county board of education entered a decision adverse to appellant, and appeal was taken. The state board affirmed the county board's decision, and another appeal was taken. The lower court affirmed the state board's decision, and appellant filed a third appeal to the state court of appeals. In denying the request for appeal, the court held that affirmance of the county board's decision by the state board was a decision of a state administrative agency acting in a quasi-judicial capacity, and the order of the lower court was itself an "appellate" decision reviewing the decision of the state board.[23]

1.3 POWERS AND DUTIES OF SCHOOL BOARDS

1.3a General Powers

It is settled law that courts will not interfere with the discretionary powers of local boards of education unless the board's actions are illegal, arbitrary, capricious, or unreasonable. Local boards of education derive their powers from the state legislature, state constitution, or from the state board of education.

In Pennsylvania, the issue before an appellate court was whether a school board had abused its discretionary powers by deciding to delete a swimming pool and locker room facilities from a new elementary school to be constructed in the district. The court held that the record supported the conclusion that the board's decision was not outside its authority. A court will not intervene in the actions of a local board unless the action was arbitrary, capricious, or wrongful. The court added that arbitrariness and caprice must not be confused with honest differences of opinion and judgment.[24]

In Wyoming an action was brought against a school board to challenge its allocation of bond proceeds between school districts.[25] The trial court entered a summary judgment for the school board, and the Supreme Court of Wyoming affirmed, holding that it would not substitute its judgment for that of the school board and would not interfere with the honest exercise of discretion by public schools. In its decision, the court said that where the board established a committee of residents to advise on the use of bond proceeds, received recommendations from independent educators, discussed the bonding issue at public meetings, and publicized the contemplated use of bond proceeds before the bond election, the board's discretion on the ultimate utilization of the proceeds did not reflect an abuse of discretion.

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[23] Hogan v. Taylor Cty. Bd. of Educ., 278 S.E.2d 106 (Ga. Ct. App. 1981).

[24] Byrne v. Alexander, 424 A.2d 602 (Pa. Commw. Ct. 1981).

[25] Hyatt v. Big Horn School Dist., 636 P.2d 525 (Wyo. 1981).

A power conflict between a local board of education and the state board of education was the focal point in a New York case. In September, 1972, respondent Yanch was hired and given a probationary appointment as a music teacher by the Bradford Central School District, and at the conclusion of her third year in the district she was granted tenure. Thereafter, she continued to work as a music teacher through the 1980 school year, although evaluations of her work were poor. The local board of education sought to dismiss Yanch, but in the meantime, the board discovered that Yanch possessed neither a provisional nor permanent state certificate to teach music. Yanch immediately applied for certification and the state commissioner of education issued a certificate to her despite the district superintendent's refusal to recommend Yanch for certification. The local board brought suit against the commissioner seeking to annul the certificate.

The New York court held that only parties who are aggrieved have standing to challenge state action. In this case, the local board was not aggrieved in any way by the grant of certification to Yanch. The court stated that certainly neither the board nor its individual members can be held liable for hiring an unqualified teacher when the teacher has been certified by the state. Therefore, the local board lacked standing to challenge the state commissioner's decision regarding certification.[26]

In another New York case, the court held that a school board had the power and authority to hold a hearing to determine whether it should file an application with the state teacher's retirement system for involuntary retirement of a tenured teacher by reason of mental and physical incapacity. The tenured teacher's petition to enjoin the holding of such a hearing was denied by the court.[27]

In an interesting California case, the state court of appeals held (1) that a local school board could compel the county to provide office space for the board, and (2) that when the county transferred many of its duties and powers to the board, but retained the obligation to provide office space, the county was still obligated to pay for those expenses.[28]

1.3b Delegation of Authority

As a general rule of law, school boards cannot delegate discretionary authority to other public or private entities. It is undisputed that in most jurisdictions only the school board can employ and terminate personnel.

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[26] Bradford Cent. School Dist. v. Ambach, 440 N.Y.S.2d 368 (N.Y. App. Div. 1981).

[27] Carver v. Ithaca City School Dist., 435 N.Y.S.2d 890 (N.Y. Sup. Ct. 1981).

[28] County Bd. of Educ. v. County of San Luis Obispo, 178 Cal. Rptr. 703 (Cal. Ct. App. 1981).

In New Mexico, a noncertified school employee brought suit against members of the school board alleging that he had been terminated without due process of law and in violation of the New Mexico statute governing the powers and duties of local school boards. It was undisputed that the employee had been terminated by the superintendent without prior approval of the school board. The board ratified the superintendent's dismissal of the plaintiff in a closed meeting after the fact. The court of appeals held this action illegal. Under state law, the superintendent has only the power to recommend a termination, not actually dismiss an employee without prior board approval. The local board had no statutory basis to delegate this function to the superintendent.[29]

In Alaska, parents of school age children brought suit to prevent the closure of an elementary school in the Anchorage School District by the municipal assembly. The Supreme Court of Alaska[30] held the ultimate decision as to school closure was within the scope of school board authority, and the board could not delegate that statutorily imposed authority to a municipal assembly or other public body.[31]

In North Carolina, corporate and individual day care center owners brought suit to enjoin the Charlotte-Mecklenburg School Board from conducting its extended day program being operated at an elementary school in Charlotte. The school board charged minimal tuition for this "extra" service to cover costs in keeping the public school building open later in the evening. The plaintiffs argued that the legislature and state board of education could not delegate to the local school board the power and authority to maintain this type of private program.

The Court of Appeals of North Carolina held that the constitutional requirement of free public education was not violated by charging tuition for the purpose of covering costs of supplemental educational programs that were not part of the students' regular school day. The court stated that while responsibility for providing general and uniform systems of education is primarily that of the legislature and state board of education, local school boards are responsible for carrying out policies and are required to consider the needs of the community in shaping programs. The court ruled that the legislature and state board properly delegated authority to the local board to adopt regulations by which school buildings may be used for other than school purposes.[32]

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[29] Gallegos v. Los Lunas Consol. Schools, 619 P.2d 836 (N.M. Ct. App. 1980).

[30] Tunley v. Municipality of Anchorage School Dist., 613 P.2d 67 (Alaska 1981).

[31] The school board's action was also held illegal due to insufficient notice of the school closure hearing.

[32] Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 285 S.E.2d 110 (N.C. Ct. App. 1981).

1.3c Authority to Provide Instruction

The Supreme Court of Pennsylvania was presented with the question of whether the state board of education must compute the state basic instructional subsidy of a school district experiencing a teacher's strike and providing less than the state-mandated number of days of instruction, as if no strike had occurred and the full 180 days of instruction had been provided.[33] The strike caused the district to provide only 156 days of instruction. Taking this into account, the state department determined that the district was entitled to an instructional subsidy of nearly $400,000 less than that claimed by the district. The court also held that the state department's method of reducing the amount of subsidy was valid.[34]

1.4 THE RIGHT OF THE SCHOOL BOARD TO ESTABLISH POLICY

An Arizona school district brought suit against another Arizona district complaining of defendant's newly adopted policy of charging tuition to high school students who resided in plaintiff district but attended high school in defendant district.[35] The Court of Appeals of Arizona held that the defendant board's new policy was a valid exercise of its discretionary power. In fact, a state statute[36] required that nonresident high school pupils pay tuition to the district where the student attends school. Therefore, even if defendant district admitted having an agreement not to charge tuition for students residing in plaintiff district, such agreement would be unenforceable under state law and the newly adopted board policy.

School board policies that contradict the religious beliefs of parents and students often lead to litigation. Such was the situation in Texas where the policy of the Amarillo school district, which limited the number of excused absences for religious holidays to two days each school year and which provided that students be given zeros for days for which they had unexcused absences, was held to violate the free exercise of religious beliefs of the plaintiffs, who were members of a sect that required abstinence from secular activity on seven annual holy days.[37]

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[33] Pennsbury School Dist. v. Commonwealth Dep't of Educ., 442 A.2d 1052 (Pa. 1980).

[34] *Accord*, School Dist. of Pittsburgh v. Commonwealth, 422 A.2d 1054 (Pa. 1980).

[35] Oracle School Dist. No. 2 v. Mammoth High School Dist., 633 P.2d 450 (Ariz. Ct. App. 1981).

[36] ARIZ. REV. STAT. ANN. § 15-19.

[37] Church of God v. Amarillo ISD, 511 F. Supp. 613 (N.D. Tex. 1981).

School board compliance with applicable state statutes is a prerequisite for the establishment of a valid policy. In Alabama, the Mobile County Education Association filed a complaint against the board of school commissioners alleging that the board had failed to comply with a state law which requires the board to consult with the teachers' association prior to adopting any written educational policy. The Superior Court of Alabama held that the board of commissioners had failed to conform with the statutory mandate, and that the teachers' association was entitled to the injunction it sought.[38]

The United States Congress donated land to Louisiana and other states for public educational purposes.[39] These land grants were known as "sixteenth section" lands and were sold to parish school boards to be used for educational purposes. It was the policy of the Tangipahoa school district to deposit "sixteenth section" revenue into its general fund. The board kept a record of how much of such revenue was produced by each ward, and disbursed the funds exclusively to the schools within the wards that produced the revenue.

Plaintiffs lived in a ward that did not have "sixteenth sections." They asserted that the board policy was contrary to state statutes which mandated that revenue must be placed in the general school fund.[40]

The Supreme Court of Louisiana held that the requirement regarding such funds was that they were to be deposited into the current school fund and used for general school purposes. "General school purposes" was left to the discretion of the duly elected school board, but the policy of this board to disburse "sixteenth section" funds to the wards that generated them was held to be contrary to the board's discretionary powers and therefore, contrary to statutory mandates.[41]

1.5 THE PUBLIC'S RIGHT TO KNOW: OPEN MEETING LAWS

1.5a Meetings

After the resignation of the superintendent, the East Baton Rouge Parish school board formed a committee consisting of all twelve members of the board and a member of the parish biracial committee to select a new superintendent. The search committee thereafter advertised for and received applications from a number of people, forty-one of whom were deemed to have met the published criteria.

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[38] Mobile Cty. Bd. of School Comm'rs v. Mobile Cty. Educ. Ass'n, 394 So. 2d 922 (Ala. 1981).

[39] 43 U.S.C. § 8719.

[40] LA. REV. STAT. ANN. § 41:718, § 17:59 (West).

[41] Cacioppo v. Tangipahoa Parish School Bd., 404 So. 2d 945 (La. 1981).

On March 8, 1980, following its open public meetings, the committee went into executive session, purportedly to discuss the character, competence, and physical and mental health of the forty-one applicants. The Louisiana open meeting statute[42] allows a public body to hold an executive session to discuss such matters. Immediately following its executive session, the committee reconvened in open public session and voted to give further consideration to ten of the forty-one applicants.

On March 31, 1980, the committee met again in open public session, and thereafter, convened in executive session to further discuss the character, competence, and health of the ten applicants. Again, after its executive session, the committee held an open public session in which it voted to give further consideration to four finalists.

On April 30, 1980, plaintiff filed suit to declare the board's actions of March 8th and 31st void as provided by the Louisiana Open Meeting Law.

The state court of appeals held that the actions of the committee exceeded the scope of the exception to the open meeting law allowing private discussion of character, competence, and health of prospective employees, by moving from a discussion of those matters to a selection process by a vote or polling of the committee members.[43]

In Massachusetts, three registered voters brought suit against the Whitman school committee alleging a violation of the state open meeting law.[44]

On November 6, 1978, the school committee held a public hearing concerning charges against an elementary school principal and to consider whether he should be dismissed or otherwise disciplined. The public hearing began at 8:00 p.m. and closed at 1:00 a.m. the next morning. The committee voted to reconvene at the regularly scheduled committee meeting on November 7 to discuss the principal's continued employment in the district. When the committee turned its attention to the charges against the principal at the November 7 meeting, the superintendent requested that the committee go into executive session for the purpose of discussing the superintendent's reputation and character. Up to that point, the reputation of the superintendent had not been at issue. During this executive session the principal was dismissed.

The court held that the school committee had violated the open meeting law because the status of the superintendent's reputation was mere subterfuge to mask the true purpose of the executive session. The discharge of the principal was held to be improper, but he was not reinstated. Instead, the court ruled that he was entitled to payment of his salary from the date of discharge until the date the school committee complies with the open meeting law.[45]

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[42] LA. REV. STAT. ANN. § 42:41 (West).

[43] Brown v. East Baton Rouge Parish School Bd., 405 So. 2d 1148 (La. Ct. App. 1981).

[44] MASS. GEN. LAWS ANN. ch. 39, § 23A-23C (West) (*as amended* 1978, ch. 372, § 9-12 (West)).

The sole issue in a Florida case was whether the state "Sunshine Law" required that an otherwise proper action of the school board be invalidated because the subject matter of that formal public action was discussed at a prior unannounced meeting between the superintendent-elect and several board members in the home of the superintendent-elect.

On at least two occasions the superintendent-elect and various board members met privately to discuss ideas on district reorganization. Included in those discussions was the topic of removal of the director of administration and the abolition of his position. Subsequently, at an open formal meeting, at which the director was present and given full opportunity to express his views, the school board voted to abolish his position and to transfer him to the elementary school in the same district. The director sought to have the board's action set aside due to a violation of the state open meeting law.[46]

The state supreme court held that the discussions between the superintendent-elect and various board members at the home of the former were technical violations of the open meeting law. By the express terms of the statute, any resolution, rule, regulation, or formal action taken at a secret meeting will not be binding. However, the court went on to rule that public final action of the board will not always be void and incurable merely because the topic of the final public action was previously discussed at a private meeting. Here the school board held a public meeting and permitted discussion on the abolition of the position and then by voice vote at a public meeting decided to abolish the director's job. This action was taken in "the sunshine" and was not nullified by the court. The board's action was not merely a ceremonial acceptance of secret actions and was not a perfunctory ratification of secret decisions at a later meeting open to the public.[47]

The principal question in a California case was whether a school board had violated the open meeting law by meeting in closed session with a prospective contractor to discuss his qualifications to assist the board in disposing of surplus real property. The closed session occurred on December 8, 1977, following a regularly scheduled public meeting of the Santa Clara board of education. The secretary of the board kept "notes" of the topics discussed during the closed session, but there were no formal minutes. The parties stipulated that there was no commitment made during the closed session that the board would employ the contractor, and there was no discussion of compensation for the proposed work. A proposed contract with the contractor was the subject of public discussion at a regular meeting of the board on March 9, 1978, and again on March 22. On April 13, after the public discussions the board voted in open session to approve the contract.

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[45] Puglisi v. School Commun. of Whitman, 414 N.E.2d 612 (Mass. App. Ct. 1981).

[46] FLA. STAT. § 286.011(1) (1975).

[47] Tolar v. School Ed. of Liberty City, 398 So. 2d 427 (Fla. 1981).

On March 30, 1978, appellants filed an action seeking an injunction to restrain the board and its superintendent from conducting executive sessions in violation of the Brown Act.[48] The court of appeals held that the contractor who met with the board in closed session to discuss his qualifications was not a public employee, but was an independent contractor. Therefore, the section of the open meeting law permitting a closed session during a regular or special meeting to consider the employment or dismissal of a public employee was inapplicable. Thus, the board had violated the open meeting law.[49]

1.5b Notice of Meetings

In New York members of a local board of education appealed from a judgment of the lower court that all measures approved at a certain board meeting were invalid for failure to comply with the notice provisions of the open meeting law. The then president of the board began contacting board members at 4:00 p.m. on June 27 to ask them to attend a meeting at 7:30 p.m. that evening at the central offices, which was not the usual meeting date or place. The only notice given to the public was one typewritten announcement posted on the central office bulletin board. At the meeting, the board took several important actions.

The court ruled that there was no dispute that the meeting of the board was subject to the requirements of the open meeting law,[50] and that the board failed to provide adequate notice of the meeting. Notice should have been conspicuously posted in several public locations at a reasonable time prior to the meeting, and the notice of the meeting should have been supplied to the local news media. The school district contended that the failure of notice was unintentional, and that according to statute, actions taken at the meeting should not be voided. The court held that from the evidence it could not see how the board's notice failures were anything but intentional violations of the open meeting law. Therefore, actions taken at the meeting were nullified.[51]

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[48] CAL. GOV. CODE § 54950 (West). The Brown Act requires that all meetings of the legislative body of a local agency must be open to the public.

[49] Rowen v. Santa Clara Unified School Dist., 175 Cal. Rptr. 292 (Cal. Ct. App. 1981).

[50] N.Y. EDUC. LAW § 95-106 (Open Meeting Law Public Officers Act).

In Oklahoma a local board of education filed suit against the superintendent challenging the validity of his employment contract approved during a special school board meeting of the immediate past board. The current board alleged that the contract was void for failure of the past board to comply with provisions of the open meeting law dealing with proper notice.[52] The superintendent claimed that the school board complied with the law, and further alleged that if any irregularity occurred it was insufficient to void the contract. When the trial court found the contract to be valid, the board appealed, alleging that notice of the meeting was inadequate, misleading, inaccurate, and fatally defective.

The state appellate court held that the employment contract was nullified due to "willful violations" of the open meeting law. The court ruled that to give the public actual notice the law, which provides for advance posting of agenda of public bodies, required that agenda be worded in plain language, directly stating the purpose of the meeting. Furthermore, the language in the notice must be direct, simple, and comprehensible to a person of ordinary intelligence and education. The court held that the notice in question was deceptively vague and ambiguous. Therefore, it was a "willful violation" of the "Sunshine Law," and the employment contract approved during the meeting was nullified.[53]

In the final case dealing with the adequacy of notice, the Oklahoma Court of Appeals had to determine the effect of open meeting law violations on actions of a board of education in relation to school annexation.[54] Appeal was taken from an order of the district court denying petition for nullification of an annexation order on the ground that the school board had violated the "Sunshine Law." The state appellate court held that the conduct of the board in passing the annexation resolution and submission of the resolution to the electorate by the superintendent violated the law. The court ruled that the law was violated due to the fact that no prior notice had been given regarding the holding of the board meeting and the subject matter to be discussed.

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[51] White v. Battagalia, 434 N.Y.S.2d 537 (N.Y. App. Div. 1980).

[52] OKLA. STAT. tit. 25, § 301-314 (Supp. 1977).

[53] Haworth Bd. of Educ. of Independence School Dist. v. Havens, 637 P.2d 902 (Okla. Ct. App. 1981).

[54] OKLA. STAT. tit. 25, § 301-314 (Supp. 1977).

The court further held that while violations of the open meeting law may not have been done in bad faith, with malice, or with wantonness, and while officials may not have consciously broken the law, they knew or should have known the law's requirements and blatantly or deliberately disregarded the law, the violations were willful, and therefore the action taken by the board was invalid. The fact that a majority of the electors voted in favor of the resolution did not excuse the open meeting violation.[55]

1.5c Taping Meetings of the Board

In New York, a school board met in executive session and voted 6-3 to terminate the employment of petitioner. The petitioner contended that the aforesaid action of the board contravened provisions of the New York open meeting law,[56] which requires that such action be taken only at meetings open to the general public. The law provides for a valid executive session to discuss termination of employment when an express condition precedent has been met by the board. The express condition is that by a majority vote of the total board, taken in open session, the board may conduct an executive session leading to employment termination. In the instant case the court ruled that the board failed to take such a majority vote in open session; therefore, the board's action violated the open meeting law.[57]

The case was reargued a few months after the initial decision was handed down. In the reargument the school board sought to have the prior decision reversed due to the availability of a transcript of the tape recording of the proceedings of the board while in open session. The court affirmed its prior decision by ruling that the availability of the transcript only buttressed the fact that no majority vote was taken by the board in open session to discuss petitioner's dismissal in executive session. Therefore, the district's reargument was held to be without merit.[58]

1.5d Requests for Information

In Oregon a school district appealed from a declaratory decree and order requiring it to disclose and make available to defendant its substitute teacher roster and other related records. The specific issues were (1) are the records exempt from disclosure as records pertaining to litigation that "is reasonably likely to occur" under the Oregon Public Records Disclosure Act,[59] and (2) are the records exempt from disclosure as "information submitted to a public body in confidence" under the Act?

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[55] *In re* Order Declaring Annexation, 637 P.2d 1270 (Okla. Ct. App. 1981).

[56] N.Y. Pub. Off. Art. 7 § 1708(3) (Consol.).

[57] Sanna v. Lindenhurst Bd. of Educ., 433 N.Y.S.2d 976 (N.Y. Sup. Ct. 1980).

[58] Sanna v. Lindenhurst Bd. of Educ., 436 N.Y.S.2d 526 (N.Y. Sup. Ct. 1981).

The lower court required the district to disclose the records pursuant to the state's public records statute. The state appellate court affirmed the lower court's decision. The appellate court held that the requested records were not exempt under the exemption for records of a public body pertaining to litigation, where the requested records did not contain information compiled because "litigation was reasonably likely to occur." The court also ruled that the records were not exempt from disclosure as "information submitted to a public body in confidence," since the records did not contain information which the school district obliged itself not to disclose.[60]

1.5e Defining a Public Body

A news director sought a preliminary and permanent injunction to keep the Louisiana High School Athletic Association from holding meetings other than those pursuant to the state open meeting law.[61] The sole issue in the appeal was the applicability of the athletic association to the open meeting law. Both the trial court and the state court of appeals held that the association was not a "public body" and therefore it was not controlled by the "Sunshine Law." Both courts described the athletic organization as a private, unincorporated association.

The Supreme Court of Louisiana held that the association and its official committees and subcommittees constitute, in their present form, collective committees or subcommittees of the parish school boards of the state board of elementary and secondary education for the purpose of the open meeting law. Therefore, the association was held to be a "public body" under the statute and thus subject to the limitations imposed by the "Sunshine Law."[62]

1.5f Invasion of Privacy

On June 6, 1980, a Michigan local school board adopted a resolution scheduling a closed executive session for June 26, 1980, for the purpose of evaluating the performance of the superintendent of schools. In his complaint, a resident of the school district contended that a closed meeting would violate the Michigan open meeting law.[63] The lower court entered a declaratory judgment in favor of plaintiff, and the state appellate court affirmed, holding that if the purpose of the closed meeting related to a hearing concerning a complaint or charge, a closed meeting would be warranted. The session was scheduled for the purpose of evaluating the superintendent, therefore the closed session was not appropriate.

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[59] OR. REV. STAT. § 192.420.
[60] Lane Cty. School Dist. v. Parks, 637 P.2d 1383 (Or. Ct. App. 1981).
[61] LA. REV. STAT. ANN. § 42:4.1 (West).
[62] Spain v. Louisiana High School Athletic Ass'n, 398 So. 2d 1386 (La. 1981).

The appellate court further held that the closed meeting was not justified on the basis of an unwarranted invasion of privacy. The court noted that from the district's viewpoint, disclosure of performance evaluations to the public may be an invasion of privacy that outweighs the public's right to know. The court held, however, that the public's right to information regarding the performance of public officials outweighs any intrusion into the privacy of the superintendent or the district.[64]

1.6 SCHOOL BOARDS AND CONFLICTS OF INTERESTS

Many jurisdictions have enacted legislation requiring board members to disclose all potential conflicts of interest that might affect their official decision-making responsibilities. Despite such legislative mandates, conflicts continue to arise over this much litigated area of school board governance.

In a Georgia case, certain citizens and taxpayers of Ware County filed a *quo warranto* proceeding seeking to have a board member ousted from his position on the county board of education. The appellees stipulated that at the time and since the board member's election to the board he had been an employee of the neighboring Brantley County school district. A Georgia statute declares that no person shall be eligible to serve as a member of one county board who is employed by another county board of education.[65] The appellant board member conceded that under the statute he was disqualified from holding his office. However, he challenged its constitutionality, contending that the statute denied him equal protection of the law since it denied him from being a member of one county board as an employee of another, but did not deny someone else from being a member of a county board who is also an employee of the board. The Supreme Court of Georgia found no equal protection violation, ruling that while the state statute did not prohibit one from being a member of a county board who is employed by the same board, the common law rule on conflicts of interest clearly prohibit such a situation. Therefore, in examining both the statutory enactment and the common law rule, the court held that there were no equal protection violations on the part of appellees.[66]

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[63] MICH. COMP. LAWS § 15.261 (1970).

[64] Ridenour v. Board of Educ. of City of Dearborn School Dist., 314 N.W.2d 760 (Mich. 1981).

[65] GA. CODE ANN. § 32-9031.

In Florida a tenured school teacher was in the Broward County school system from 1958 to 1978. In 1974, she ran for and was elected to a position on the county school board. In 1975, the Florida legislature enacted legislation which provided that no teacher can serve on the same school board where she was employed. Subsequently in 1978, the teacher took a personal leave of absence without pay. In the same year she was again elected to a position on the school board.

The state court held that the tenured teacher, who, after taking personal leave of absence without pay, was reelected to a position on the school board was not an employee of the school board. She performed no teaching duties, received no compensation, and was not under the control of the board, even though her continuing contract as a tenured teacher created an expectancy of future employment in the district. Therefore, the teacher was held not to be in violation of the statute prohibiting an employee of a state agency from holding office as a member of the governing board which is also his or her employer.[67]

On June 14, 1979, a local Pennsylvania board of education elected one of its members as its treasurer. Plaintiff alleged that the election was recorded as eight affirmative votes, including that of the person elected treasurer, and one opposed vote. Plaintiff contended that the person elected was by law disqualified from voting in favor of himself as treasurer of the board. Plaintiff argued that the board should be required to amend the minutes of the June 14 meeting and expunge the new treasurer's vote from the record.

The Pennsylvania court held that one who has a direct personal interest in a matter under consideration by the board of which he is a member is disqualified from voting on the matter, and if his vote is determinative, the action taken is void. However, in this case the new treasurer's vote for himself was not determinative, and therefore, the court held that his election was not invalid.[68]

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[66] Culpepper v. Veal, 272 S.E.2d 253 (Ga. 1980).

[67] Wright v. State Comm'r of Ethics, 389 So. 2d 662 (Fla. Dist. Ct. App. 1980).

[68] Lesho v. Board of School Directors, 422 A.2d 1198 (Pa. Commw. Ct. 1980).

1.7 SCHOOL DISTRICT AND BOARD MEMBERS ELECTIONS, APPOINTMENT, AND RECALL

1.7a Voting Irregularities

In Louisiana, the issue before the court was whether votes cast in a primary election for a legally withdrawn candidate for public office should be included in the total votes cast for all candidates in that particular race in arriving at the number of votes necessary to constitute a majority for declaring a winner. Three persons qualified for the position of school board member from district 1, seat A, in the primary election held in September, 1980. In August, 1980, however, one of the candidates legally withdrew from the contest but her name still appeared on the absentee and voting machine ballots. As a result, the withdrawn candidate received forty-seven votes in the primary election, while the other two candidates received 444 votes and 436 votes respectively. The trial court held that the votes for the withdrawn candidate should be included in total votes cast, and the state appellate court affirmed, holding that in a primary election for the position of a school board member, votes cast for a withdrawn candidate had to be included in the total votes cast for all candidates in determining the number needed to constitute a majority for declaring a winner; which resulted in neither of the two remaining candidates receiving a majority; and therefore, a general election had to be called.[69]

The subject of litigation in an Alabama case was whether electors in a city having its own school board were entitled to vote in an election to determine members of the county school board. The state statutes did not specifically prohibit such activity. Plaintiffs, county residents, alleged that their votes were diluted by the votes of electors residing in the city. City voters had their own city independent school system and city school board. The Fifth Circuit Court of Appeals, in holding for plaintiffs, ruled that the Alabama statute, which permits electors in the city to vote for members of the county school board, impermissibly dilutes the voting strength of the county electors, and that the city electors did not have a substantial interest in the county election that would warrant their right to participate.[70]

In Louisiana, plaintiffs instituted an action against the registrar of voters to compel him to remove thirteen voters from the registration rolls of the district. Specifically, plaintiffs contended that the challenged registrants actually resided within the limits of another district and

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69. Wayne v. Green, 389 So. 2d 104 (La. Ct. App. 1980).
70. Phillips v. Andress, 634 F.2d 947 (5th Cir. 1981).

were therefore not qualified electors of District No. 1. The record showed that according to a board resolution passed on July 16, 1972, the challenged registrants clearly resided in District No. 10. In 1977, the city of Natchitoches annexed certain territory lying in District No. 10, thereby extending the city limits eastward. The contested registrants all reside within this annexed area. Although the school board took no action after the annexation to change the area or limits of the two districts, the registrar of voters removed the challenged registrants from the rolls of District No. 10 and placed them on the registration rolls of District No. 1.

The court held that the school district boundaries did not expand automatically when the area in question was annexed into the city. Thus, since the school district boundaries had not changed, the challenged registrants, who lived in the annexed area, were improperly placed on the rolls of District No. 1. The court compelled the registrar of voters to remove the thirteen voters from the district's rolls.[71]

An appeal in New York involved the resubmission by a school board of defeated budget propositions to the voters. Following the defeat of the 1980-81 school budget in June, 1980, the board called a special meeting for the purpose of submitting six propositions dealing with specific allocations of funds for school activities to the voters. All six propositions were defeated. By July 10, 1980, petitions were filed with the board requesting that the six propositions again be submitted to the school district voters. The board did so, and on August 19, 1980, two of the propositions were passed. Meanwhile, plaintiff commenced an action to enjoin any resubmission of the defeated propositions to the electorate. The New York court held that the action of the board was entirely proper where the propositions were resubmitted after filing of petitions by qualified voters as required by statute. In addition, the court held that the school board's resubmission to the electorate of defeated budget proposals did not violate the equal protection rights of those who had voted against the proposals.[72]

Following the defeat of the chairman of the Dover, New Hampshire school committee in the November, 1979 election, the new school committee met on January 7, 1980, and elected another person as chairman. On May 12, 1980, the school board again met. Immediately after the meeting, School Administrative Unit No. 11 met and elected still another person chairman of the committee. The heart of this controversy was whether the action of the School Administrative Unit No. 11 removed the person elected chairman by the school committee on January 7.

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[71] Bradley v. McKnight, 392 So. 2d 1081 (La. Ct. App. 1980).

[72] Richards v. Board of Educ. of Vestal Cent. School Dist., 445 N.Y.S.2d 29 (N.Y. App. Div. 1981).

The Supreme Court of New Hampshire held that pursuant to state law, the Dover school committee shall meet on the first Monday of January following school board elections for the purpose of newly elected board members taking their oaths, and "organizing" for the ensuing year. It was under this provision that the plaintiff was elected chairman in January, 1980. The court held that the term "organizing" for the upcoming school year included the selection of the chairman, secretary, and treasurer. The court ruled that there was no doubt that plaintiff was the duly elected chairman of the Dover school committee.

Dover school district is a single district school administrative unit. In most parts of the state a single administrative unit contains several boards and districts, with separate duties and responsibilities. The court noted that the school committee, which the plaintiff was elected chairman, and the school administrative unit, which another person was elected chairman, are separate entities with separate duties. The court concluded that both persons were entitled to hold their respective offices of chairman, but for different purposes.[73]

1.7b Election Contests

In Connecticut, three vacancies on a five member board were to be filled by an election held on November 6, 1979. In accordance with the town charter, the Republican and Democratic parties each nominated two candidates. In addition to those four party-endorsed candidates, a fifth candidate, a registered Republican who was unsuccessful in gaining her party's endorsement, ran as a petition candidate. The three registered Republicans garnered the most votes, but the election moderator certified the Democrat with the most votes, who finished fourth overall, as the winner of the third position on the board in place of the Republican who finished third. The moderator's decision was predicated on his belief that the applicable minority representation laws precluded all three registered Republicans from being elected.

The Republican displaced by the moderator's action brought suit to challenge the legality of this action. The Supreme Court of Connecticut held that plaintiff was entitled to his seat on the school board. The court ruled that no statute or charter provision barred Lobsenz from assuming the board position to which he was duly elected.[74]

1.7c Appointment of Board Members

In a Texas case, the appellant, Lorenzo Brown, was appointed to fill a vacancy on the board of trustees of the Dallas Independent School

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[73] Chwalek v. Dover School Comm., 424 A.2d 406 (N.H. 1980).

[74] Lobsenz v. Davidoff, 438 A.2d 21 (Conn. 1980).

District for trustee district number five. Appellees brought suit to prevent him from taking office on the ground that appellant had not been a resident of trustees district number five for six months immediately preceding his appointment.[75]

Brown argued that the six months residency requirement of the Election Code was in conflict with the provisions of another Texas statute concerning elections of school trustees.[76] The statute relied upon by Brown stated that for the first election of school trustees after the number of districts were increased, a candidate for trustee from a district need not be a resident of such district, but that, for all subsequent elections six months residence within the district was a prerequisite to filing for office.

The lower court held that the six month residency requirement controls, hence the appointment of Brown was nullified. The Court of Civil Appeals of Texas affirmed the trial court decision, stating that the purpose of the statute was to provide better representation by assuring that voters will be better acquainted with the qualifications and views of the candidates. The court held that the two statutes in question, in fact, were not contradictory. The statute relied upon by Brown stated only that the candidate of the first election of school trustees after the number of districts were increased need not be a resident of that district for the proceeding six months.

Brown was appointed to fill a vacancy and was not the first trustee to hold office since the number of districts was increased.[77]

The issue of appointment of board members was again litigated in South Carolina. Plaintiffs, as residents, electors, and taxpayers of the county, brought an action seeking declaratory relief from alleged unconstitutional portions of various acts dealing with the county board of education. The Supreme Court of South Carolina held that a state statute authorizing the governor to appoint members of the county board upon the recommendation of the county's legislative delegation did not violate the separation of powers provisions of the state constitution. The function of making or recommending appointments to public office does not necessarily or ordinarily belong to either the legislative, executive, or judicial branches of state government. Unless restrained by the constitution, the legislature can provide for this power to be performed by any of the three branches. Here, the legislature lawfully decided to make the function of recommending school board appointments a legislative function.[78]

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[75] This six month residency requirement was mandated by art. 1.05 of the Texas Election Code 1951 (Vernon Supp. 1980).

[76] TEX. REV. CIV. STAT. ANN. art. 2783d (Vernon 1980).

[77] Brown v. Patterson, 609 S.W.2d 287 (Tex. Ct. App. 1980).

[78] Crow v. McAlpine, 285 S.E.2d 355 (S.C. 1981).

1.7d Recall of Board Members

On June 11, 1980, appellants in a Pennsylvania case represented a petition to the Court of Common Pleas seeking the recall of a school director. The petition charged the director with voting to disobey a court-mandated desegregation order and neglecting his duties. The appellants made two efforts to serve copies of the petition, the first by sending the petition by certified mail, and the second by leaving the petition in Conley's mailbox. Conley filed preliminary objections attacking the service of the petition. On the day before the date scheduled for argument of the preliminary objections, Conley filed a responsive answer to the petition, denying that he had voted as the appellants alleged or that he had failed to perform his statutory duties. The Pennsylvania court held that although the service was ineffective, that defect was cured by Conley's having filed an answer on the merits denying, and thus putting at issue, the arguments of the appellant's petition for his removal.[79]

On June 7, 1978, plaintiffs in a recent Ohio case commenced an action for the recall of a member of the board of education. The member filed a motion to strike and dismiss the complaint because it was allegedly vague and ambiguous. The only allegations in the complaint were that the member failed to perform an official duty and committed an act of misconduct in office. The state appellate court held that removal proceedings are quasi-penal in nature and should be strictly construed. The court added that the law does not favor the removal of duly elected public officials. An Ohio statute[80] states that the complaint for removal must "specifically" set forth the charges against the official. The court ruled that the complaint was not sufficiently definite and certain as to permit defendant to adequately prepare his defense.[81]

1.7e Method of Selection of Board Members

The issue of the discriminatory effect of certain methods of selecting board members was litigated by the Fifth Circuit Court of Appeals in three cases.

Several black citizens in the city of Thomaston, Georgia brought suit against the city board of education challenging the composition and method of selection of the board members. To create a public school system for the city of Thomaston, the legislature in 1915 passed a statute that created an independent school system from the then existing R.E. Lee Institute. The institute was a private school for the benefit of "white pupils and patrons"; however, its failing financial status in 1915 required that action be taken to ensure educational opportunities for the area. The legislature that established the public school system named the institute's board of trustees as the Thomaston board of education and adopted the method utilized by the former board for the subsequent election of members to the Thomaston board of education. This method of selection provided that each year one board member would retire and that member, together with the remaining board, would select the new board member. This self-perpetuating form of selection was used until the petition in this case was filed in 1980. At the time this suit was filed, no black had ever served on the Thomaston board of education. The members of the Thomaston board, in addition to their role as school board members, exist nominally as the board of trustees for the institute.

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[79] *In re* Stone, 437 A.2d 103 (Pa. Commw. Ct. 1981).

[80] Ohio Rev. Code Ann. § 3.08 (Page).

[81] Mack v. Mack, 419 N.E.2d 1108 (Ohio Ct. App. 1979).

The Fifth Circuit held that the unique system for selection of the city board that operated in a discriminatory manner, together with the self-perpetuation of the board that originated from an all-white board of trustees, was in violation of plaintiff's rights under the fourteenth amendment. The court stated that the statutory scheme for selection to the Thomaston board had been purposely and systematically utilized to exclude blacks from the opportunity to participate in the educational policy-making process.[82]

In a similar factual situation to the previous case, black residents of Pickens County, Alabama brought an action to challenge the constitutionality of the procedures used to elect the Dickens County board of education. The plaintiff's alleged that the election districts were impermissibly malapportioned, and that the at-large components of the electoral scheme unconstitutionally diluted the votes of blacks.

Prior to the initiation of this suit, the five members of the board were elected on a county-wide or at-large basis. The district court held that the board must be elected in the following manner to conform to desegregation orders: four members elected from four-single-member districts and the fifth member to be elected at-large. The plaintiffs readily accepted the provision that the four single member districts would each elect a single representative, but they contested the at-large election of the fifth member.

The Fifth Circuit held that given Alabama's express policy for five board members and structural desirability of a five-member board, trial court, in fashioning reappointment plan for school board elections, did not act improperly in imposing an at-large plan to elect fifth board member in county in which four school attendance zones, which substantially overlapped school board election districts, were established in a successful effort to comply with a desegregation order.[83]

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[82] Searcy v. Williams, 656 F.2d 1003 (5th Cir. 1981).

The legality of the at-large method of electing school board members was also addressed by the Fifth Circuit in a Florida case. The court held that while there is nothing per se unconstitutional about the at-large system of electing board members, unless the purpose of adopting or operating that particular system is done invidiously to minimize or cancel out the voting potential of racial minorities, and it has that effect, then it is unconstitutional. The court held that the at-large election system was developed with a discriminatory purpose and was therefore unlawful.[84]

1.7f Resignation of Board Members

On January 8, 1981, petitioner Rubin wrote to members of a New York school board and advised them of her intention to resign as a member of the board for health and personal reasons. In her letter she requested that her resignation be effective on March 1, 1981. At an executive session of the board held on January 20, 1981, those members of the executive board who were present voted unanimously to accept Rubin's resignation. The board president wrote to Rubin acknowledging the board's acceptance of her resignation effective March 1, 1981.

Subsequently, on February 27, 1981, Rubin sent another letter to the board, wherein she expressed her intention to vote in March on an important local issue, and concluded that her resignation would not be effective until March 15, 1981. The board refused to defer the resignation until March 15 and Rubin brought suit stating that since her letter of January 8, 1981, was never delivered to the secretary of state, as required by state statute, it was not and could not be valid or effective.

In agreeing with Rubin, the court held that there was no proof in the record that her purported resignation was delivered to or filed with the secretary of state, who is the proper party to receive such information. Under the circumstances, the court found that there was no resignation by petitioner Rubin as a matter of law.[85]

1.7g Disqualification of Candidates

In Pennsylvania, appellant Owen filed nomination papers with the Luzerne county registration commission and election bureau seeking to have his name placed on the ballot for the office of school director. Owen filed his nomination papers as a "citizen's choice" candidate.

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83. Corder v. Kirksey, 629 F.2d 1191 (5th Cir. 1981).
84. McMillan v. Escambia Cty., 638 F.2d 1239 (5th Cir. 1981).
85. Rubin v. Community School Bd., 439 N.Y.S.2d 572 (N.Y. Sup. Ct. 1981).

The election bureau rejected Owen's nominating papers for the reason that there was not fixed thereto an affidavit as required by statute, setting forth that the candidate had not been a registered or enrolled member of a party thirty days before the May primary election. Appellant admitted that no such affidavit had been filed and that the reason he could not file the affidavit was because he did have a party affiliation during the critical time period. Owen contended, nevertheless, that the election bureau acted erroneously in rejecting his nomination papers.

The Pennsylvania court held in favor of the election bureau. The court ruled that (1) failure of Owen to file the required affidavit was a proper ground for rejection of his papers; (2) any unfairness arising from the fact that Owen had no opportunity to disaffiliate himself from a party thirty days prior to the primary was subject to being remedied by the legislature, not the courts; and (3) the statutory requirement of disaffiliation was a necessary and laudable effort on the part of the legislature to prevent disappointed candidates from forming their own political enclaves to get their names on a ballot, and that this practice neither denied equal protection or due process rights of eligible candidates.[86]

The second case to be investigated in this section also originated from Luzerne County, Pennsylvania. Michael I. Butera was nominated as the Democratic candidate for the position of school director. Appellant, Walter Placek, filed a petition to void and vacate Butera's nomination certificate. The record showed that both a Michael J. Butera and a Michael I. Butera resided as registered electors within the school district. The name indicated on appellant's petition was Michael J., rather than Michael I. Butera. Michael I., however, was served with appellant's petition and appeared before the lower court.

In his petition, appellant objected to the nomination certificate on the ground that it did not comply with the state election code. The alleged defects included (1) the occupation of the candidate was not set forth, (2) the proper form was not utilized, and (3) there was no statement that a quorum of the democratic executive committee had convened to nominate Butera. The lower court dismissed appellant's petition because of the technical defect of the petition regarding Butera's middle initial. The appellate court held that the election code must be liberally construed so as not to deprive an individual of his right to run for office. In view of this policy, the court held that the defect in appellant's petition was so technical that his petition should not have been dismissed on the ground that jurisdiction over Michael I. Butera had not been obtained. Nonetheless, the court held that appellant's objections were also technical, and therefore the nomination certificate was held to be valid and lawful.[87]

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[86] *In re* Owen, 436 A.2d 260 (Pa. Commw. Ct. 1981).

New Jersey was the site of the final case reported in this section. It was conceded that the petition for nomination of Nelson Page as a candidate for the board of education contained the signatures of only ten persons, the minimum required by state statute. However, it was also conceded that one of the signers had been convicted of a crime which disenfranchised him, and which thus renders him disqualified from voting in the school district.

Although after notice of the defect, Page obtained additional signatures of qualified voters, the court held that the pertinent statute did not permit such a defect to be cured. The statute reads in part:

> When a nominating petition is found to be defective excepting as to the number of signatures, the secretary of the board shall notify the candidate of the defect and the candidate may amend the same in form or substance, but not to add signatures.[88]

Based upon the above statutory language, Page was not allowed to cure the defect in his petition for nomination as a school board member.[89]

1.8 SCHOOL DISTRICT ORGANIZATION

In a California school reorganization case, the San Bernadino County Committee on School District Reorganization formulated and recommended a reorganization plan for Chaffey Joint Union High School District which would divide the territory of the district into three separate unified school districts. Chaffey district, which would go out of existence upon effectuation of the plan, sought a writ of mandate to set aside the county committee's action and to prohibit the committee from transmitting the plan to the state board of education for its approval. The Court of Appeals of California held (1) that the plaintiff school district had standing to maintain the action, (2) that the state board of education was not an indispensable party defendant, and (3) that the plaintiff district's failure to exhaust administrative remedies was a valid defense to the entire suit. Therefore, due to procedural difficulties, the plaintiff was not allowed to maintain its reorganization lawsuit.[90]

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[87] *In re* Nomination Certificate, 436 A.2d 263 (Pa. Commw. Ct. 1981).

[88] N.J. STAT. ANN. § 18A:14-12 (West).

[89] Kumpa v. Page, 429 A.2d 1073 (N.J. Super. Ct. App. Div. 1981).

[90] Alta Loma School Dist. v. San Bernadino Cty. Comm. on School Dist. Reorganization, 177 Cal. Rptr. 506 (Cal. Ct. App. 1981).

A Texas case involved the creation of a new school district called Lake Travis ISD. This new district was to be created entirely from the Dripping Springs ISD which is located in Travis and Hays Counties. Appellant, who challenged the reorganization, appealed the county school board's decision to the state education commissioner. The commissioner sustained appellant's objection to the reorganization plan.

On appeal to the Court of Civil Appeals of Texas, the commissioner's decision was reversed on the ground that appellant lacked standing to challenge the creation of the new school district where there was no evidence before the commissioner that appellant resided within the old school district, owned property in the old district, or had children attending school in the old district. Therefore, the court held that appellant was not affected by the decision of the school board to create a new district.[91]

School district consolidation was the issue presented to the Tennessee Court of Appeals. Plaintiff, Humphreys County board of education, filed suit against defendant, Gloria Logan, superintendent of the Humphreys County district, alleging that the superintendent had unlawfully failed to execute the board's decision to transfer certain teachers and equipment from Waverly Central High School to McEwen High School. The board a few months earlier had voted to consolidate Waverly and McEwen High Schools. Logan counterclaimed and sought a declaratory judgment that the board's action was an attempt to re-open McEwen High School which was unlawful because no advance permission for re-opening the school had been granted by the state commissioner of education as required by state statute.

The court held that upon the consolidation of the two high schools, McEwen High School ceased to exist, and thus the board had to have prior approval from the state board of education and show "unusual circumstances" to reopen McEwen High. Therefore, Logan's refusal to transfer teachers and equipment from Waverly High to McEwen High was held to be justified.[92]

1.9 SCHOOL BOARDS AND THE TRANSPORTATION OF STUDENTS

1.9a Bus Contracts

In Massachusetts, a private bus transportation company brought an action challenging the transportation plan of the school district which utilized public rather than private bus service. The state appellate court held that the district's plan conformed to statutory requirements. The statute barring public carriers, under threat of loss of certain financial assistance, from engaging in school bus operation "exclusively" for transportation of students does not bar the city from using public carriers for pupil transportation. "Exclusively" as used in the statute denoted the situation where public service is limited to students only. The court held that this was not the case; the public carriers would not be offering their services exclusively to students, but would continue to seek business from the entire community.[93]

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[91] Hurlbut v. Dripping Springs ISD, 617 S.W.2d 332 (Tex. Civ. App. 1981).
[92] Humphreys Cty. Bd. of Educ v. Logan, 622 S.W.2d 553 (Tenn. Ct. App. 1981).

In New York, the board of education brought an action to permanently enjoin defendants, a bus company, from discontinuing or interrupting certain school bus transportation services provided for in a contract between the board and the bus company. The court ruled that the injunction was warranted as there was no indication of unfair dealings on the part of the board in its relations with the bus company. The court stated that inherent in the requirements that boards of education act to promote the best interests of the school district is the right and legal duty to modify its bid specifications as required by public interests.[94]

In California, bus services were provided to a San Diego school district under contract with Goodall's Charter Bus Service. In late 1974 during negotiations for the contract, the district told Goodall it would be necessary to install a two-way radio system for communication between its drivers and dispatchers. The district also proposed to monitor these communications. Goodall agreed to install a radio system, but did not consent to the monitoring. Goodall began providing bus service in June, 1976. After obtaining a license, Goodall began using a two-way radio system. The district learned Goodall's frequency, bought a crystal tuned to that frequency, and placed it in the school district's scanner. The district began monitoring Goodall's radio broadcasts in November, 1976. From the monitoring the district learned which of Goodall's buses had arrived late and based on this information assessed contractual penalties for late arrivals. Goodall learned of the monitoring in January, 1976, and brought suit to prevent the monitoring. The California appellate court held the action could not be maintained under a federal statute authorizing a person whose oral communications have been unlawfully intercepted to bring a civil action for damages,[95] because Goodall, as a licensee using a frequency in the business radio system, could not reasonably expect its broadcasts to be private.[96]

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[93] Plymouth Cty. Bus Transp., Inc. v. Greater New Bedford Reg. Voc-Tech. High School Comm., 417 N.E.2d 481 (Mass. App. Ct. 1981).

[94] Board of Educ., Smithtown Cent. School Dist. v. Bimco Industries, Inc., 444 N.Y.S.2d 718 (N.Y. App. Div. 1981).

In Pennsylvania, an alleged oral contract between Rudolph, a bus service provider, and the school district for an amount due for bus services rendered by Rudolph for ten school days during the 1976 school year resulted in litigation. By way of preliminary objection, the district asserted that Rudolph had failed to state a claim in that the alleged oral contract had never been formally ratified by the school board as required by § 508 of the Public School Code. Section 508 provides in part that the affirmative vote of a majority of all the members of the school board, duly recorded, is required to enter into contracts of any kind. Under the code, failure to comply with the provisions of the law will render the action of the board void and unenforceable.

The Pennsylvania court held that the procedural requirement of a duly recorded school board vote was directory only. The court stated that the expression of the board member's approval required by § 508 can be evidenced in ways other than by a formal vote recorded in the minutes. To hold otherwise, the court stated, would arm every school board in the commonwealth with a tool by which they could regularly avoid valid contracts. All they would need to do is fail to specifically record in their minutes the required vote; then at their whim, a contract could be avoided by acknowledgement of the failure.[97]

1.9b Bids

In Arkansas, appellee school district advertised for bids on eighteen school buses. A number of bids were received, with the Nabors Company being the lowest. After the bids were opened, but before the contract was awarded, appellant, Walt Bennett Ford, an unsuccessful bidder, filed a written protest with the district contending that Nabors (1) was not a franchised dealer and could not give a valid warranty of repairs for the vehicles, (2) was not a licensed vehicle dealer as required by Arkansas law, (3) had not claimed, and was not now entitled to claim, the five percent preference for Arkansas residents pursuant to state statute,[98] and (4) that appellant alone had submitted a written request for the resident preference, all of which made appellant the acceptable low bidder.

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[95] 18 U.S.C.A. § 2520.

[96] Goodall's Charter Bus Serv. v. San Diego USD, 178 Cal. Rptr. 21 (Cal. Ct. App. 1981).

[97] Rudolph v. Albert Gallatin School Dist., 431 A.2d 1171 (Pa. Commw. Ct. 1981).

[98] ARK. STAT. ANN. § 14-293 (Repl. 1979).

The district allowed Nabors Company to submit a letter claiming the five percent preferences, and in addition, allowed Nabors to proceed as the agent of a franchised and licensed vehicle dealer. When the district awarded the contract to Nabors, appellant filed suit to void the contract. The Supreme Court of Arkansas held that appellant did have standing to sue for alleged wrongs, but that the court did not have enough information to come to an intelligent decision;[99] therefore, the case was remanded to the chancery court for hearing of additional evidence. The state supreme court further held that it could not determine whether the contract of sale was executory or executed, and since Nabors was not made a party it could not render a decision on the matter.

In a New York case, the issue was whether certain contract awards made by the board were in violation of the laws pertaining to competitive bidding. In the summer of 1979, the board invited bids on a contract calling in part for the transportation of handicapped children from their homes to school in the borough of Brooklyn. The specifications required eighty "mini-wagons" each designed to carry fourteen passengers. Potential bidders were advised that they were to bid to supply such vehicles in multiples of ten and that the board would then accept the number of bids sufficient to reach the required total of eighty vehicles.

On August 1, 1979, the board reached its goal of 80 "mini-wagons" by accepting the bids of the seven lowest bidders.

Almost immediately after accepting the seven bids, the board learned that two of the successful bidders were found unfit to do business in the state. Consequently, the board withdrew the awards to those two bidders, which left the board twenty vehicles short of the required eighty needed and only two weeks away from the opening of school. Instead of turning to the petitioners, as the next lowest bidders, to supply the twenty "mini-wagons," the board turned to the adjacent borough of Queens and accepted bids from two suppliers in that borough. Petitioners, the eighth and ninth lowest bidders, brought suit to annul the award to the two Queens suppliers.

The Supreme Court of New York held that where the disqualifications of two of the original seven successful bidders brought about a shortfall in the number of vehicles available to fill the original contract requirements prior to commencement of performance, the board was required to make the contract award to the next lowest responsible bidders or to reject all bids and consider new proposals or rebid the entire contract. The court directed the board to award the contract to the petitioners.[100]

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[99] Walt Bennett Ford, Inc. v. Pulaski Cty. Special School Dist., 624 S.E.2d 426 (Ark. 1981).

In another New York case, the board of education awarded to Pioneer Transportation, effective September, 1979, a four-year contract for transportation services. The contract, which was awarded to Pioneer pursuant to public bidding, obligated Pioneer to transport over 19,000 students to and from 74 named schools. In September, 1981, the board learned that the New York City Transit Authority was going to terminate its transportation services rendered to 18,000 students on Staten Island. The board determined that it did not have to solicit bids with respect to these services. Rather, it decided to award Pioneer the contract, which was in excess of $4,000,000. Desirous of obtaining the contract for the transportation of the additional 18,000 pupils, Staten Island Bus, Inc., one of the largest school bus contractors in New York, brought suit to compel the board to seek competitive bids before it provided further bus transportation in Staten Island. The New York court held that the action of the school board violated the state's competitive bidding laws despite the existence of a contract between the board and Pioneer.[101]

The issue of retention of bid security was litigated in a South Dakota case. After advertising, the school district opened bids for student transportation on February 7, 1979. The invitation for bids required a bid security of ten percent of the total amount of the submitted bid. It also required that the successful bidder secure a performance bond for 100 percent of the amount of the contract.

Black Hills and Western Tours, Inc. submitted a bid on certain routes to provide bus service for the district, and its bid was accepted by the board on March 13, 1979. Black Hills also gave the district its ten percent bid securities prior to the granting of the contract. However, it could not produce the 100 percent performance bond, and therefore the district voided the contract and readvertised for additional bids. The district, however, retained the appellant's ten percent bid security which totaled $28,129.50.

The issue before the Supreme Court of South Dakota was whether the district was acting within the law in retaining the bid security. The court held that the appellant was estopped from receiving the bid refund in light of the district's reliance upon the bid security, as evidenced by its original award of the contract to appellant.[102]

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[100] Tufaro Transit Co. v. Board of Educ. of City of New York, 436 N.Y.S.2d 886 (N.Y. App. Div. 1981).

[101] Staten Island Bus, Inc. v. Board of Educ., 440 N.Y.S.2d 293 (N.Y. App. Div. 1981).

[102] Rapid City Area School Dist. v. Black Hills and Western Tours, Inc., 303 N.W.2d 811 (S.D. 1981).

1.9c Duty to Provide Transportation

In New York, a school district found plaintiff's daughter ineligible for bus service because the distance between the entrance to the school she attended and her driveway entrance at home was in excess of fifteen miles. The plaintiff then claimed that he could take his daughter to his lumbermill, where the bus could pick her up, and this would be within the fifteen mile limit. The district refused to adopt his suggestion. The New York court held for the plaintiff, ruling that it would be arbitrary and capricious on the part of the district not to adopt plaintiff's lumbermill as a "home terminal" for measuring purposes.[103]

In Pennsylvania, a school board voted to discontinue school bus service on the private, interior roads of a private residential development named Hemlock Farms. As a result of that decision, the school children of Hemlock Farms would be picked up and discharged at the entrance to the development. Concerned parents sued to enjoin the district from discontinuing the previous service on the interior roads.

The court held that the board committed no abuse of discretion or error of law in its decision to discontinue bus service on the private, interior roads of plaintiff's development, and no judicial intervention was warranted. Courts will generally not interfere with a school board's exercise of its discretionary power unless the action was based on a misconception of law, ignorance through lack of inquiry into the facts necessary for an intelligent judgment, or unless the action is the result of arbitrary will. The parents in the instant case failed to meet their burden of showing that the district's decision was unlawful.[104]

Finally, the Supreme Court of Oklahoma held that where a 4⅛ mile road over which parents sought to require the school district's buses to travel each day to transport their children was hazardous, the school board did not abuse its discretionary powers by refusing to require school buses to travel over the road.[105]

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[103] Gundrum v. Ambach, 442 N.Y.S.2d 661 (N.Y. App. Div. 1981).

[104] Abrahams v. Wallenpaupack, 422 A.2d 1201 (Pa. Commw. Ct. 1980).

[105] Davis v. School Dist. No. D-14, 625 P.2d 630 (Okla. 1981).

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EMPLOYEES

Joseph C. Beckham

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2.0 INTRODUCTION

This year's chapter on employment litigation in public school settings omits consideration of liability under 42 U.S.C. § 1983 of the Civil Rights Act of 1871, but continues the format in which federal questions are addressed at the outset followed by legal issues more often associated with state law. The principal subject matter, legal issues in public school employment, is further limited to cases in which public school employees or local, state or federal education agencies are principal litigants, thus only incidental consideration is given to unemployment compensation claims or private schools. Since employment cases are often fact-intensive and multi-issue oriented, it is not unusual to see citations to the same case in more than one section or subsection of the chapter.

2.1 DISCRIMINATION IN EMPLOYMENT

Federal courts are the principal forum for litigation involving allegations of discriminatory employment practices. The federal questions upon which jurisdiction is asserted include a number of federal statutes and the provisions of the equal protection clause of the Fourteenth Amendment. However, the volume of constitutional claims has declined,[1] replaced by reliance on federal statutory provisions prohibiting discrimination.

The shifting burden of proof in employment discrimination cases continues to be defined by federal courts. Interpretation of federal statutes, particularly the provisions of Title VII of the Civil Rights Act of 1964,[2] has resulted in standards for determining what constitutes a prima facie case, the extent of an employer's burden in rebuttal, and plaintiff's obligation in substantiating a claim for relief and damages.

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[1] The lone 1981 case exclusively involving an equal protection claim, Cousin v. Board of Trustees of Houston Mun. Sep. School Dist., 488 F. Supp. 75 (N.D. Miss. 1981), *rev'd and remanded*, 648 F.2d 293 (5th Cir. 1981), was predicated on the application of criteria set out in Singleton v. Jackson Mun. Sep. School Dist., 419 F.2d 1211 (5th Cir. 1969), and has since been *vacated and remanded* to the district court for a determination of whether *Singleton* is involved. 661 F.2d 377 (5th Cir. 1981).

As the majority of cases cited in this section deal with interpretation of Title VII, it is useful to review the standards adopted by the United States Supreme Court in resolving Title VII cases. Title VII prohibits discrimination in employment because of race, color, religion, sex and/or national origin. Two alternative legal theories have been advanced as a basis for relief under the law: disparate treatment and disparate impact.

Title VII cases involving claims of disparate treatment require a proof of discriminatory motive and are usually associated with a plaintiff's allegation that the employer has treated the plaintiff and people similarly situated less favorably than others because of race, color, religion, sex or national origin.[3] To rebut a plaintiff's prima facie case, a defendant must articulate some legitimate, nondiscriminatory reason for the employment action.[4] The sufficiency of evidence in satisfying defendant's burden of proof is whether the evidence raises a genuine issue of fact such that the trier of fact could conclude that the employer had not been motivated by a discriminatory intent.[5] If defendant carries this "articulation" burden, then plaintiff must prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were a pretext for discrimination.[6]

The theory of disparate impact under Title VII requires no showing of an intent to discriminate, but does demand evidence that the consequences of an employment practice fall more heavily on one group than another. In a disparate impact case, the employer is obligated to prove the business necessity for the challenged employment practice to rebut a prima facie case. Unlike a disparate treatment case, a rational or legitimate nondiscriminatory reason is insufficient; rather, the business practice must be essential and its purpose compelling.[7]

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[2] 42 U.S.C. § 2000e. *See also* 42 U.S.C. § 2000d which prohibits discrimination on the basis of race, color or national origin in programs receiving federal financial assistance. For analysis of this latter statute where applied to employment discrimination cases in which voluntary settlement between federal regulatory agencies and school districts have been effectuated, *see* Drayden v. Needville Indep. School Dist., 642 F.2d 129 (5th Cir. 1981).

[3] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[4] Texas Dep't of Commun. Affairs v. Burdine, ____ U.S. ____, 101 S. Ct. 1089 (1981).

[5] *Id.* at 1094, 1095.

[6] McDonnell Douglas Corp. v. Green, 411 U.S. at 804.

[7] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

2.1a Race

Under the disparate treatment standard of Title VII a prima facie case of employment discrimination based upon race in Mississippi has been shown where plaintiff established he was paid less than his white counterpart for work requiring substantially the same responsibility.[8] Plaintiff, a black male, was hired on a trial basis after the school district's white printer resigned. He received raises in pay on three occasions, and was promoted to the former employee's position but was never paid the same amount as the white employee. Plaintiff resigned when he was refused a raise to the level of his predecessor's annual salary, and the school district then rehired the white printer at an increase of $1,200 more than plaintiff had been paid.

The school district argued that the difference in pay was not based on race, but instead on different job responsibilities and quality of performance between the two printers. The Fifth Circuit Court of Appeals recognized that a sufficient showing of a significant difference in the quality of job performance would constitute a legitimate nondiscriminatory reason for the employer's action in rebuttal of the prima facie case. However, the plaintiff proved a racially discriminatory pay differential by testimony corroborating that the plaintiff's supervisor had asked, in response to plaintiff's inquiry about a raise, "Being Black, where do you think you'll get a job as a printer in this state?"[9] The court reasoned that the implication of such a statement was that the school board could pay plaintiff less than a white employee for doing acceptable work.[10]

Plaintiff's burden in establishing a prima facie case of racial discrimination under Title VII requires a showing of differential treatment relative to similarly situated members of another race. With regard to hiring, a plaintiff must demonstrate that he or she belongs to a racial minority, that he applied and was qualified for the job, that he was rejected despite his qualifications and that the position remained open after his rejection and the employer continued to seek application from persons of plaintiff's qualifications.[11] In Wisconsin, a black applicant for a position as an industrial arts teacher did not make out a prima facie case of disparate treatment where the record established that mathematics and industrial arts certification were required for a position and the plaintiff possessed certification in industrial arts alone.[12]

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[8] Pittman v. Hattiesburg Mun. Sep. School Dist., 644 F.2d 1071 (5th Cir. 1981).

[9] *Id.* at 1076.

[10] The plaintiff's claim to damages for constructive discharge could not, however, be predicated on a difference in pay alone. 644 F.2d at 1077.

[11] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[12] Fusi v. West Allis Pub. Schools, 514 F. Supp. 627 (E.D. Wis. 1981).

Where wrongful discharge is alleged by a plaintiff, a showing that a black employee was discharged and a white employee retained under apparently similar circumstances appears to raise an inference that an Alabama school board's actions were based on a discriminatory motive. In considering plaintiff's prima facie case involving an allegation that the school board denied tenure to a black teacher because he was not properly certified while granting tenure to white teachers in similar situations, the Fifth Circuit Court of Appeals concluded the district court improperly evaluated plaintiff's prima facie claim of disparate treatment.[13] The district court entered judgment for the board but failed to make findings as to whether five white teachers who received tenure while teaching subjects in which they were not certified were progressing toward certification so as to be distinguishable from the plaintiff.

Defendant's burden in articulating a legitimate nondiscriminatory reason for a challenged employment decision of a school board was met in several cases involving a prima facie case of disparate treatment under Title VII. Where a black school administrator in Alabama claimed to be better qualified for appointment as principal than a white school administrator, the school board was able to justify the white administrator's appointment on the basis that the appointment of the white administrator was made in connection with the desegregation plan adopted as part of school consolidation.[14] In another Alabama case, a black physical education coach's claim of disparate treatment was rebutted by a showing that the decision not to renew his contract and that of another white coach was predicated on the school board's intent to hire a new head football coach and give that head coach flexibility in selecting his assistants to improve the school's football program.[15] While a history of racial discrimination and statistical evidence of disparity in employment practices might establish a prima facie case, a Louisiana school board's reliance on employment criteria established by the state department of education in the local board's selection and promotion of employees met the requirement for legitimate nondiscriminatory reasons under Title VII.[16]

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[13] Baldwin v. Birmingham Bd. of Educ., 648 F.2d 950 (5th Cir. 1981).

[14] Lee v. Macon Cty. Bd. of Educ., 650 F.2d 608 (5th Cir. 1981). *See also* Oliver v. Kalamazoo Bd. of Educ., 510 F. Supp. 1104 (W.D. Mich. 1981), establishing that state law and collective bargaining agreements must fail if their implementation would prevent a board from carrying out court-ordered desegregation.

[15] Lee v. Ozark City Bd. of Educ., 517 F. Supp. 686 (M.D. Ala. 1981). The school board's evidence of nondiscriminatory intent was enhanced by a showing that the new head coach had employed another black assistant coach to replace the nonrenewed plaintiff.

[16] Adams v. Gaudet, 515 F. Supp. 1086 (W.D. La. 1981).

The distinction between disparate treatment and disparate impact as legal theories applicable under Title VII is illustrated in a Colorado case brought by a black teacher who claimed that she was denied employment in a school district because of her race. The teacher's prima facie showing of disparate treatment was rebutted by the interviewing principal's testimony that he selected a teacher who he felt would be cooperative, congenial and open to suggestions rather than plaintiff, characterized as brusk and overbearing in the job interview. However, the Tenth Circuit Court of Appeals reversed and remanded the case to the district court based on misapplication of the disparate impact test. The teacher alleged that hiring and assignment practices had resulted in high concentrations of black teachers in a few schools within the district. The court of appeals reasoned that these practices created a discriminatory effect, requiring the district to prove business necessity for the challenged practice.[17] The district court erred in permitting the board to rebut a prima facie case of disparate impact by articulating a legitimate, nondiscriminatory reason for the practice.

Defendant's burden, once a prima facie case of disparate impact is established, is illustrated in a South Carolina case involving a school district's determination to award pay raises to teachers who had received high grades on the National Teacher Examination (NTE).[18] The board policy had a disproportionate impact on black teachers, denying pay raises to two percent of white teachers and 38.6 percent of black teachers within the district. Relying on the decision in *United States v. South Carolina*,[19] the Fourth Circuit Court of Appeals held that the use of the NTE for the purpose of granting pay raises was justified to improve the ability of the school district to attract the best qualified teachers and to encourage district teachers to supplement their study and improve their knowledge of those teaching skills which the NTE validly evaluated. The use of the NTE scores in determining pay raises met the test of business necessity, and the school district's purpose in encouraging knowledge of teaching skills and attracting teacher applicants was an essential practice with a compelling purpose.[20]

2.1b Sex

Elements of a prima facie case involving sex discrimination under Title VII and the Equal Pay Act[21] were established by a female teacher and coach in West Virginia where the plaintiff established that the school board maintained a long-standing policy prohibiting female teachers from coaching boys' sports and paid female coaches of girls' teams no more than half the salary of male coaches of boys' teams. Separate board policies made explicit the disparate treatment claims alleged by the plaintiff, who, in her effort to exhaust administrative remedies through internal grievance and external complaints to state and federal agencies, was further penalized by the school board's action to transfer her and remove her from coaching. The school board was unable to sustain a defense which alleged that there existed substantial differences in the duties performed by male coaches as opposed to their female counterparts, and the district court awarded plaintiff back pay and attorney's fees as the prevailing party in the litigation.[22]

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[17] Williams v. Colorado Springs, Colorado, School Dist., 641 F.2d 835 (10th Cir. 1981).

[18] Newman v. Crews, 651 F.2d 222 (4th Cir. 1981).

[19] 445 F. Supp. 1094 (D.S.C. 1977), *aff'd mem.*, 434 U.S. 1026 (1978).

[20] Plaintiffs proposed a performance evaluation system as an alternative to achieve the business purpose with a reduced discriminatory effect, but the court of appeals rejected this approach as subjective and inexact. 651 F.2d at 225.

[21] 29 U.S.C. § 206(d)(1).

In two cases involving dismissal for insubordination, school employees were unsuccessful in establishing claims of sex discrimination under Title VII. A female coach in Illinois who refused to comply with her superior's request to have some students temporarily vacate lockers in the girls' locker room sought to establish a prima facie case of sex discrimination by alleging that she was dismissed for insubordination while her male superior was not disciplined, that no investigation of her grievance over the incident had been undertaken by school authorities and that the school district employed more male than female coaches. These allegations were not considered sufficient to raise an inference of discrimination in her dismissal.[23] Similarly, a black female counselor in South Carolina who interfered with a reading test administration on the basis that no notice had been given to her students, failed to establish a prima facie case of sex discrimination, particularly when the record established that the counselor had repeatedly refused to explain her actions to her superiors.[24]

The defendant's burden of proof in disparate treatment cases involving sex discrimination under Title VII continues to involve the articulation of some legitimate nondiscriminatory basis for the action taken.[25] In the first of three cases where the employment decision involved promotion or hiring, a plaintiff established a prima facie case by showing that she was a member of a protected class, applied for a position for which she was qualified and the position sought remained open and was subsequently filled by a male applicant. A female accountant who sought promotion in a Nebraska school district had her prima facie claim successfully rebuted by the school district's showing that plaintiff had difficulty getting along with fellow employees and her immediate supervisor.[26] In a second case, a Minnesota school district met its burden to articulate a legitimate nondiscriminatory reason for declining to hire a female applicant for a high school principalship by showing that the male hired had successful experience as a school principal and a check of former employers indicated unfavorable comments about plaintiff's performance.[27] However, a female plaintiff in Delaware, who sought a position as a student activity coordinator, prevailed when the school district failed to establish a legitimate nondiscriminatory basis for hiring a less qualified male, despite an unsupported allegation that plaintiff was not hired because she was viewed as being "less qualified."[28]

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[22] Burkey v. Marshall Cty. Bd. of Educ., 513 F. Supp. 1084 (N.D. W. Va. 1981).
[23] Kneeland v. Bloom Twp. High School Dist., 518 F. Supp. 890 (N.D. Ill. 1981).
[24] Moore v. Bonner, 526 F. Supp. 143 (D.S.C. 1981).
[25] Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978).

A New York school board's use of separate seniority lists for male and female physical education teachers was challenged by male teachers as unlawful sex discrimination under Title VII. The district court held that the issue of whether the separate seniority lists were discriminatory or for the purpose of facilitating maintenance of separate programs for male and female students was a question of fact precluding summary judgment, and noted that no claim for award of back pay was appropriate since the board had initiated an action for declaratory relief to resolve any question about the legality of the proposed merger of the seniority lists. While the question of whether or not the separate lists constituted a "bona fide" seniority system under notions of equal employment occupied the court, the issue of whether or not disparate treatment or disparate impact standards would apply in defense of the board's policy was not clarified.[29]

The return to work provisions of a Louisiana school board's maternity leave provisions were successfully challenged by female pregnant teachers under Title VII. While the return to work provisions did not establish an irrebuttal presumption of unfitness violative of due process,[30] the terms of the provisions were held to violate Title VII by vesting discretion in the superintendent to determine when a teacher could return from maternity leave while granting no concomitant discretion to the superintendent with respect to teachers returning from sick leave.[31] Though the teachers established that the facially neutral reinstatement policy had the effect of depriving women of employment opportunities because of sex, the school board sought to defend its policy on the basis of "business necessity." The board argued that refusal to reinstate was necessary because no teaching vacancies existed and the district could not afford to bear the cost of keeping the teachers on the payroll as relief teachers. The economic justification offered by the board was not evaluated by the court primarily because the plaintiffs were able to establish that less discriminatory alternatives existed to achieve the district's fiscal objectives.[32] As the Fifth Circuit Court of Appeals pointed out:

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[26] Cummings v. School Dist. of City of Lincoln, 508 F. Supp. 20 (D. Neb. 1980), *aff'd*, 638 F.2d 1168 (8th Cir. 1981).

[27] Danzl v. North St. Paul-Maplewood-Oakdale Indep. School Dist., 663 F.2d 65 (8th Cir. 1981).

[28] Tyler v. Board of Educ. of New Castle Cty., 519 F. Supp. 834 (D. Del. 1981).

[29] Board of Educ. of City of New York v. Califano, 507 F. Supp. 827 (S.D.N.Y. 1981).

[30] *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

> By the Board's own admission, achievement of its fiscal objectives did not require it to utilize pregnancy as a basis for determining which teachers would remain on the district's payroll. Rather, a number of less discriminatory alternatives existed. . . . [T]eacher and relief positions could have been filled on the basis of seniority or other objective factors. Likewise, the Board could have laid off any number of teachers it felt necessary by random selection. Moreover, a policy of deferring the return of all teachers on leave, both those who had been pregnant and those who had suffered from other temporary disabilities, would have saved the Board more money than the discriminatory policy it utilized.[33]

In a Michigan case involving pregnancy leave provisions of a school board, plaintiffs successfully established a violation of Title VII. Pregnant female teachers argued that under board policy pregnancy leaves were treated differently than other sick leave provisions. The federal district court found pregnancy leaves provisions relative to seniority rights, fringe benefits and accumulated tenure, length of service requirements and placement on return to be different when compared with district sick leave policies. In granting summary judgment for the plaintiffs, the court recognized the district's pregnancy leave provisions violated the disparate treatment standards of Title VII.[34]

Title IX of the Education Amendments of 1972[35] has been interpreted to grant a private cause of action based on a plaintiff's claim of denial of participation in or the benefits of an educational program receiving federal financial assistance.[36] The application of Title IX to employment practices and the authority of federal agencies to regulate those practices where federal funds are involved, is at issue.[37] While no 1981 cases have resolved the substantive issues involved in a sex-based employment discrimination claim under Title IX, the right to an implied cause of action in favor of private litigants alleging employment discrimination under education programs or activities which receive federal financial assistance has been affirmed in an Alabama federal district court.[38]

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[31] Clanton v. Orleans Parish School Bd., 649 F.2d 1084 (5th Cir. 1981).

[32] *See* Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

[33] Clanton v. Orleans Parish School Bd., 649 F.2d at 1098.

[34] Thompson v. Board of Educ., Romeo Commun. Schools, 526 F. Supp. 1035 (W.D. Mich. 1981).

[35] 20 U.S.C. § 1681.

2.1c National Origin

Suits against school districts in which plaintiff alleges national origin minority discrimination are subject to the same standards of proof as in other Title VII discrimination cases. In the California case of curriculum supervisor of Mexican-American descent who was not renewed by the school board, the federal district court held the supervisor failed to establish a prima facie case of national origin discrimination. On appeal the Ninth Circuit Court of Appeals affirmed, concluding that the record below established that even if plaintiff could have made a prima facie case under Title VII, the board's evidence that the superivisor was unable to function effectively in her job particularly due to her inability to work with other employees, including employees of Mexican-American descent, was sufficient to articulate a legitimate nondiscriminatory reason for nonrenewal.[39]

In a similar case, an applicant of Philippino national origin sued a Texas school district alleging she was refused employment as an elementary school teacher. On appeal from the district court the Fifth Circuit Court of Appeals recognized that there was some dispute as to whether plaintiff had established a prima facie case since the school district asserted that an additional employment criteria not met by plaintiff was favorable employment references. The appellate court concluded that information received from a previous private school employer justified the school board's decision not to employ the plaintiff.[40] Information received from the previous employer included complaints that the plaintiff was "exceptionally demanding" of students and did not "strictly observe" school rules concerning limitations on corporal punishment, creating school board reservations about plaintiff's capacity to work with students and diligence in conforming to school district policies.[41]

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[36] Cannon v. University of Chicago, 441 S. Ct. 677 (1980).

[37] These issues are before the United States Supreme Court. *See* Bell v. Dougherty Cty. School Sys., *ruling below*, 622 F.2d 735 (5th Cir. 1980), and North Haven Bd. of Educ. v. Bell, *ruling below*, 629 F.2d 773 (2d Cir. 1980).

[38] Strong v. Demopolis City Bd. of Educ., 515 F. Supp. 730 (S.D. Ala. 1981).

[39] Correa v. Nampa School Dist. No. 131, 645 F.2d 814 (9th Cir. 1981).

[40] Panlilio v. Dallas Indep. School Dist., 643 F.2d 315 (5th Cir. 1981).

2.1d Age

Two cases involving mandatory retirement provisions of school districts were challenged in state courts in 1981. Central to the decision in both cases was the application of state law in determination of the appropriate measure of damages for an alleged wrongful termination because of age. In one case, the Supreme Court of Montana interpreted the provisions of the Montana Human Rights Act[42] to prohibit age discrimination unless age was manifestly related to job performance. In the case of a principal terminated under the school board's mandatory retirement policy, the Human Rights Act was held to supersede the board policy in the absence of school district evidence to support the necessity of such a policy, and the retirement benefits such as social security, pension and state retirement could be considered in establishing an award of back pay.[43]

In a second case, the adjudication of an award of compensatory damages for wrongful termination based upon a mandatory retirement policy was evaluated under North Dakota law. In addition to holding that social security benefits could be deducted from the award of back pay, the North Dakota Supreme Court required the school district to repay amounts to the state retirement system since the teacher would have been entitled to a higher annuity upon retirement had she not been wrongfully terminated.[44] A related issue, the mitigation of damages based on the plaintiff's failure to exercise reasonable diligence to locate another position, was held to be dependent upon a showing by the school district that the teacher could have obtained similar employment in the vicinity.[45]

2.1e Handicap

Section 504 of the Rehabilitation Act of 1973 prohibits handicap discrimination under any program receiving federal financial assistance.[46] An applicant for a position as a teacher's assistant and substitute teacher charged that a New York school district violated

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[41] *Id.* at 318.

[42] MONT. CODE ANN. § 49-1-101 *et seq.*

[43] Dolan v. School Dist. No. 10, 636 P.2d 825 (Mont. 1981).

[44] Selland v. Fargo Pub. School Dist. No. 1, 302 N.W.2d 391 (N.D. 1981).

[45] *Id.* at 393-94.

[46] 29 U.S.C. § 794.

§ 504 when it allegedly refused to hire him solely because of a prior record of mental illness. In response to questions in the employment interview concerning whether or not he had ever received psychiatric treatment, plaintiff disclosed that he had once suffered a nervous breakdown, diagnosed as a schizophrenic reaction. After examination by two physicians representing the school district, the applicant was found physically and mentally qualified, but was rejected for employment. The federal regulations implementing § 504 specifically prohibit pre-employment inquiries related to handicap unless related to an applicant's ability to perform the job.[47] The district court ruled that the school district's inquiry was impermissible since it violated the regulatory standard and was not related to or an indication of plaintiff's present fitness for a position as a teachers' aide or substitute.[48]

Other cases applying the provisions of § 504 to public school employment issues have focused on cases in which the employee was not rehired or was terminated following an accident resulting in a handicap. In one case a former school bus driver was not rehired following an accident in which his leg was amputated. A Kentucky State Board of Education regulation which prohibited the local board from hiring a person who did not possess both natural legs was overruled and the local board was required to rehire the former driver where it was demonstrated that he was qualified to drive and no expenditures were required to equip the school bus so that he could operate it.[49] However, a teacher injured in an auto accident did not establish a cause of action under § 504 merely by alleging that his termination would be harmful to the perceptions of handicapped children, particularly where the New Jersey school board made the determination on the basis of the teacher's ability to perform rather than on the basis of his handiap.[50]

2.2 SUBSTANTIVE CONSTITUTIONAL RIGHTS

Courts confronted with claims involving the alleged violation of substantive constitutional rights must balance the public employee's right to free exercise against the public employer's interest in promoting the efficiency of the public services it performs through the employee.[51] In applying this balancing test to the freedom of speech guarantees of the first amendment, the Supreme Court has pointed out that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."[52] In reaching the conclusion that a public school teacher had been improperly dismissed for the exercise of free speech the court found no evidence that the teacher's public comments interfered either with his classroom performance or the operation of the school.[53] In *Givhan*, the Supreme Court expanded the area of constitutional protection involving free speech to situations in which the employee's expressions are made in private, however, since substantive constitutional rights are not absolute, the court concluded that a similar balancing test would be required.[54]

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[47] 45 C.F.R. § 84.14(a). The regulation provides that a recipient of federal funds "may not make pre-employment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap."

[48] Doe v. Syracuse School Dist., 508 F. Supp. 333 (N.D.N.Y. 1981).

[49] Coleman v. Casey Cty. Bd. of Educ., 510 F. Supp. 301 (W.D. Ky. 1980).

[50] Sabol v. Board of Educ. of Twp. of Willingboro Cty., 510 F. Supp. 892 (D.N.J. 1981).

In addition to the balancing test which must be applied when a public employee establishes a prima facie claim alleging the employer's denial of substantive constitutional rights, the Supreme Court in *Mt. Healthy*[55] added a second step to the process of determining whether the employee can prevail. That second step permits the employer to show by a preponderance of the evidence that the same employment decision would have been reached for other reasons even if the protected conduct had not been considered.[56] Hence, the employer may prevail where it can be established that the employment decision would have been made on other grounds unrelated to the employee's constitutionally protected conduct.

2.2a Speech and Association

In applying the teacher freedom of speech holdings of the United States Supreme Court to a Tennessee case involving a teacher's termination on grounds of conduct unbecoming a teacher and inefficiency, the Sixth Circuit Court of Appeals considered the type of conduct that would swing the balance in favor of the public employer. The teacher's remarks to her school principal reflected a generalized hostility to all blacks, that resulted in tension between the teacher and her black principal and led to close scrutiny of her classroom performance and working relationship in a school with a substantial population of black children and faculty. Evidence of declining performance on evaluations, inability to work with a black aide and withdrawal from interaction with black colleagues weighed heavily in favor of the school district's determination to terminate the teacher. Conceding the teacher's constitutional right to make private statements to her superior, the court concluded that the interest of the school board in maintaining an efficient and regularly functioning school system and in employing effective teachers outweighed the teacher's right.[57]

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[51] The question of whether a private educational program may be liable for a denial of substantive constitutional rights appears to hinge on whether the program could be said to be engaged in state action. *See* Ross v. Allen, 515 F. Supp. 972 (S.D.N.Y. 1981). *But see* Rendell-Baker v. Kohn, 641 F.2d 14 (1st Cir. 1981).

[52] Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

[53] *Id.* at 569-70.

[54] Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 414 (1979).

[55] Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

[56] *Id.* at 287.

The *Mt. Healthy* test, which permits the public employer to overcome a claim based on the denial of substantive constitutional rights, was applied by a Texas federal district court in such a way as to preclude the employee from establishing a prima facie case of wrongful dismissal. The teacher claimed that the reasons given for her termination were a pretext for the denial of her right to free speech and that the actual reason for her dismissal was her vigorous processing of grievances on behalf of herself and other teachers. The court reviewed uncontradicted evidence that the teacher had left school grounds without permission, failed to attend an inservice meeting when directed to do so, did not fill out personnel forms required for certification and walked out on her evaluation conference. The court held that this evidence could be relied on by the board in the termination for insubordination and concluded that the teacher's exercise of free speech was not a substantial or motivating factor in her discharge.[58]

In a similar case from California, a school principal reprimanded a teacher-coach for mishandling promotion of the school football team and failure to fully inform the principal of planned programs. The teacher-coach widely distributed a rebuttal letter that contained personal attacks on the principal. Subsequent to this exchange, the teacher-coach was not reappointed as head coach and denied a salary supplement he received for this activity. Invoking the *Mt. Healthy* standards, a California Court of Appeals ruled that much of the rebuttal letter contained statements which enjoyed no constitutional protection and that the letter was not the motivating factor relied on by the principal in his decision not to reappoint.[59]

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[57] Anderson v. Evans, 660 F.2d 153, 159 (6th Cir. 1981).

[58] Heins v. Beaumont Indep. School Dist., 525 F. Supp. 367 (E.D. Texas 1981). *See also* McCutcheon v. Board of Educ., 419 N.E.2d 451 (Ill. App. Ct. 1981), where principal failed to support her theory that refusal to approve absence and bringing absence as part of dismissal charges constituted retribution for criticism of certain school expenditures which she had voiced at school board meeting she attended during absence.

[59] Shimoyama v. Board of Educ., 174 Cal. Rptr. 748 (Cal. App. 1981).

Despite the intricacies of balancing tests and the difficulty in determining whether an employee's exercise of free speech was a substantial or motivating factor in the employment decision, a number of substantive due process cases were decided on the basis of whether or not the plaintiff could carry the burden of proof required to establish a prima facie case. A Federal district court in Illinois found sufficient evidence of a denial of First Amendment speech and association in a case involving a school board's hostile policy toward a teacher's association.[60] Evidence that the board sought to prohibit teachers from discussing the association during the day, charged fees for the association's use of school facilities, and denied extra duty, compensation or supervisory positions to association members constituted a prima facie case denying First Amendment rights.[61] In a Texas suit alleging nonrenewal of contract in retaliation for remarks made in conversation with superiors and school board members, a teacher prevailed when he established that his criticism of board employment policy was constitutionally protected and a motivating factor in the board's decision not to renew.[62] The Supreme Court of Alabama held that a nonrenewed teacher had met his burden of proof to establish that his nonrenewal was based upon his exercise of constitutionally protected freedom of speech when he established that the principal's recommendation not to rehire was related to the teacher's investigation and public disclosure of mishandling of funds by the principal.[63]

A plaintiff's claim that the state's action is substantially motivated by a desire to retaliate for the exercise of substantive constitutional rights is insufficient to establish a prima facie case. While a teacher's activity as a representative of her teaching association was considered to be protected under the First Amendment, a change in teaching schedule which was imposed upon her was not considered a sufficient legal injury justifying relief.[64] The federal district court in Kentucky reasoned that some sanction must be pleaded, the consequence of which would have a chilling effect on the exercise of constitutionally protected rights.[65] In the absence of an adverse personnel action, such as reduction in rank or loss of pay, a teacher's claim would not be actionable even though the administrative action could be substantially motivated by a desire to curb the exercise of substantive constitutional rights.

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[60] Park Educ. Ass'n v. Board of Educ. of Lake Park, 526 F. Supp. 710 (N.D. Ill. 1981).

[61] *Id.*

[62] Brown v. Bullard Indep. School Dist., 640 F.2d 651 (5th Cir. 1981).

[63] Abston v. Woodward, 398 So. 2d 237 (Ala. 1981). The plaintiff charged in his complaint that one of the principal's last acts before resigning was a recommendation not to rehire plaintiff.

[64] Reichert v. Draud, 511 F. Supp. 679 (E.D. Ky. 1981).

[65] *Id.* at 682.

Courts continue to be responsive to claims alleging a denial of substantive constitutional rights, but remain reluctant to accept a well-pleaded complaint absent evidence to substantiate a prima facie case. A showing that a part-time choral music teacher in New Hampshire had made a number of complaints about the music program was not sufficient to establish a violation of her First Amendment rights when her application for full-time employment as choral music teacher was rejected.[66] Where a school psychologist refused to comply with allegedly illegal school board mandates governing handicapped children and was terminated, a New York court granted the opportunity for an administrative hearing to determine if the evidence adduced would support the allegation.[67] In a case involving claims that teachers had been denied contract renewal for their constitutionally protected union activity, a Massachusetts appellate court was similarly disposed to remand for further findings of fact relative to the decision not to recommend rehiring.[68]

2.2b Privacy

The substantive right to privacy implied in the Constitution is designed to protect the individual from undue state interference. While court opinions have linked privacy to various constitutional provisions, the existence of a right to privacy has been affirmed by the United States Supreme Court on a number of occasions.[69]

While a female kindergarten teacher would have no substantive due process right to refuse to submit to a required physical examination by a New York school district's male physician,[70] privacy would appear to extend protection to a Florida school employee's interest in breastfeeding her child during her duty-free lunch period.[71] The Fifth Circuit Court of Appeals has recognized that a mother's desire to breastfeed her child was entitled to constitutional protection, and ruled that it was an error to dismiss a complaint without trial to determine whether the school board's interests in prohibiting breastfeeding were justifiable.[72] While recognizing that the school board has a legitimate interest in preventing disruption of the educational process and insuring a teacher's efficient performance of duties, the court determined these interets must be balanced against the constitutional protection from undue state interference which a woman has in decisions respecting breastfeeding her child.[73]

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[66] Marshall v. Elwell, 495 F. Supp. 306 (D.N.H. 1980).

[67] Forrest v. Ambach, 436 N.Y.S.2d 119 (N.Y. Sup. Ct. 1980).

[68] Southern Worchester Cty. v. Labor Rel. Comm'n, 422 N.E.2d 791 (Mass. App. Ct. 1981).

[69] *See generally*, Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Stanley v. Illinois, 405 U.S. 645 (1972).

[70] Gargiul v. Tompkins, 525 F. Supp. 795 (N.D.N.Y. 1981).

[71] Dike v. School Bd. of Orange Cty., 650 F.2d 783 (5th Cir. 1981).

[72] *Id.*

A former high school principal in Delaware established a denial of privacy rights when the board sought to terminate his contract on the basis of allegations that he had established a romantic liasion with his female assistant principal. The board acted to terminate without notice or hearing, giving the principal no opportunity to respond to the allegations or defend against the harm to reputation which the board's inquiry and local gossip had inspired. A jury verdict awarding reinstatement and compensatory as well as punitive damages was sustained after modification.[74]

2.3 PROCEDURAL DUE PROCESS

There is no constitutional right to procedural due process unless the person has been deprived of a property or liberty interest.[75] In the context of public school employment, the employee must demonstrate that a genuine entitlement has been denied or that a stigma has so injured reputational interests as to invoke the protections of due process. Once it is determined that a deprivation has occurred, the court must resolve the question of what due process is due the employee. Aspects of state as well as federal law must be applied to assess the alleged deprivation and the requisite elements of notice and hearing that must be granted.

2.3a Property Right

Contractual provisions and state statutes are influential considerations in determining the existence of an employee's property right. The Fourth Circuit Court of Appeals has held that an employee reassigned from the position of principal to that of a teacher had no legitimate claim of entitlement to his position as principal where his continuing contract was silent on the question of reassignment and Virginia statute authorized school boards to reassign without a showing of good cause.[76] Similarly, a Tennessee school board's statutory authority to transfer without cause did not deny property interests to a teacher-coach relieved of his coaching assignments, even though the district superintendent had recommended that the teacher-coach continue his coaching assignment.[77] Where a New Jersey high school principal was transferred to an elementary school principalship, it was held that a predictable reduction in future salary expectancy was not sufficient to create a vested property right compelling due process.[78]

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[73] *Id.* at 787.

[74] Schreffler v. Board of Educ., 506 F. Supp. 1300 (D. Del. 1981).

[75] Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 593 (1972).

[76] Wooten v. Clifton Forge School Bd., 655 F.2d 552 (4th Cir. 1981).

Courts have been cautious in weighing what would constitute a contractual obligation creating a genuine expectancy of employment with a public school board. An applicant for a school administrative position in New Jersey sought to establish that the board's adopted selection criteria created a legitimate claim of entitlement to the position. When the board selected an individual with lesser qualifications than the applicant, he alleged a deprivation of a property interest protected by due process. In characterizing the selection criteria as a guide in choosing the employee, the federal district court held that the criteria do not create a guarantee to the applicant and concluded,

> Evaluation of an administrator's qualifications for educational positions under the due process or even the equal protection clause by federal courts should not be undertaken in the absence of a claim that the defendants were motivated by racial or sex discrimination or an attempt to restrain First Amendment rights. Consequently, this Court cannot and will not intervene to second-guess the defendants' subjective discretionary judgment in applying the criteria for evaluating the applicants who applied for the position of Principal.[79]

A Minnesota administrator, who had no statutory right to continued employment, sought to fashion a contractual obligation out of a school board's resolution to offer three administrative positions, including the superintendency, to the existing personnel. Prior to board rescission of the offer, but after a resolution establishing salaries for the positions, the administrator prepared written contracts and signed his. The Eighth Circuit Court of Appeals ruled that the drawing-up and signing of the contract was not authorized by the board, nor could it constitute a formal acceptance of a contract on which the administrator could rely in his effort to establish a reasonable expectation of reemployment.[80]

A former high school principal in Delaware, who was not renewed by the school board, was successful in establishing a right to due process based on the school district's commitment to renew his contract if he received satisfactory evaluations. The commitment gave rise to a genuine expectancy of reemployment when his overall evaluation was satisfactory and listed areas for improvement were acted upon by the employee. After notice of renewal based on satisfactory evaluations had been communicated, the federal district court regarded board efforts to refuse to renew as a denial of property rights and ordered reinstatement along with a jury award of compensatory and punitive damages.[81]

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[77] White v. Banks, 614 S.W.2d 331 (Tenn. 1981).

[78] Williams v. Board of Educ., 422 A.2d 461 (N.J. 1980).

[79] Kramedas v. Board of Educ., 523 F. Supp. 1268, 1273 (D. Del. 1981).

[80] Tatter v. Board of Educ. of Indep. School Dist., 653 F.2d 315 (8th Cir. 1981).

State statutes protecting employment status were relied upon as the basis for granting property rights worthy of due process protection in a number of cases. Where tenured teachers in Massachusetts were denied full-time positions due to district budgetary problems, but were offered reassignments to half-time positions, state courts recognized statutory entitlements to tenured status that would require due process.[82] Despite a contractual provision granting the school board the right to terminate at will, a nontenured teacher in Alabama, who was summarily terminated, was held to have a statutory right under the state's teacher tenure act to a property interest that created an expectancy of employment through the end of the school term.[83]

An employee's status may determine whether a property right exists, but contractual status alone may not be dispositive. A terminated cafeteria manager in Pennsylvania, who worked under a professional employee contract, relied on her contractual status as a property right insuring due process and reinstatement. The state concluded that, despite the express contract, her status was in doubt and a hearing to resolve the disputed issue was necessary.[84] In another Pennsylvania case, a school district met the burden of "substantial evidence" in establishing that its business manager was a public officer dismissible at will rather than a public employee with a property right to due process.[85] A former tutor originally employed under federal Comprehensive Employment and Training Act grants sought a hearing at which she could prove her claim that she had achieved status as a teacher within the meaning of state statute law and the implied contractual arrangements of the school district. In granting an opportunity for a hearing, the Supreme Judicial Court of Maine held that mutually explicit understandings, administrative rules and statutory provisions must be considered in the determination of an employment status giving rise to a legitimate claim of entitlement.[86]

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[81] Schreffler v. Board of Educ., 506 F. Supp. 1300 (D. Del. 1981).

[82] *In re* Gorham School Bd., 436 A.2d 74 (N.H. 1981); Setterlund v. Groton-Dunstable School Comm., 415 N.E.2d 214 (Mass. 1981).

[83] Hayes v. Mobile Cty. Bd. of School Comm'rs, 405 So. 2d 366 (Ala. 1981).

[84] Rosenberg v. South Allegheny School Dist., 432 A.2d 654 (Pa. Commw. Ct. 1981).

[85] Bedeski v. Greater Nanticoke Area School Dist., 427 A.2d 1269 (Pa. Commw. Ct. 1981).

2.3b Liberty Interest

The Tenth Circuit Court of Appeals has held that compensatory damages, reinstatement and back pay might be appropriate where a teacher's discharge is based on false allegations and the teacher was never permitted to rebut the charges in a due process hearing.[87] The Oklahoma case involved a nontenured teacher who was not renewed and sought damages and reinstatement based on a denial of liberty and property rights. In a previous holding, the court held that no entitlement to due process had been shown, but remanded for jury consideration of whether a liberty interest had been infringed.[88] No new trial was conducted, and the district court ruled that the only available relief would be a court ordered hearing at which plaintiff would have the opportunity to clear her name. In reversing the ruling, the court of appeals recognized that reputational damage alone, absent a showing of tangible harm such as the foreclosure of other employment opportunities, would be insufficient to support a cause of action under § 1983. However, if all the elements of a deprivation of a liberty interest were shown, at least nominal damages could be awarded; and if the charges leading to discharge (or other adverse employment decision) were proven false, actionable damages and equitable relief would be appropriate.[90]

In another case involving the nonrenewal of a nontenured teacher, the South Dakota Supreme Court was unwilling to award plaintiff reinstatement, and ordered only that harmful material which had been placed in the employee's personnel file be purged.[91] The court's decision was not predicated on the application of § 1983 but was confined exclusively to the application of state law and the terms of a collective bargaining agreement governing notice and an opportunity to contest negative evaluations of a teacher's performance. The school board was held to have statutory authority not to rehire without regard to the negative information, but that authority did not justify the board's failure to follow the notice provisions and procedural requirements of the negotiated agreement.[92] Although no reinstatement was required in this case, the court did adopt a test involving reinstatement.

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[86] Lovejoy v. Grant, 434 A.2d 45 (Me. 1981). The court held that exhaustion of administrative remedies under the Comprehensive Employment Training Act program was not a proper basis for dismissing a claim brought under state statute law. *Id.* at 47. *But see* Emerson v. Bible, 278 S.E.2d 382 (Ga. 1981) and Wolff v. Board of School Directors of Chichester, 429 A.2d 129 (Pa. Commw. Ct. 1981).

[87] McGhee v. Draper, 639 F.2d 639 (10th Cir. 1981).

[88] McGhee v. Draper, 564 F.2d 902 (10th Cir. 1981).

[89] 42 U.S.C. § 1983.

[90] McGhee v. Draper, 639 F.2d at 643.

[91] Fries v. Wessington School Dist., 307 N.W.2d 875 (S.D. 1981). *But see* Holt v. Board of Educ. of Webutuck, 439 N.Y.S.2d 839 (N.Y. App. Div. 1981), principal's letter of remand could be made part of personnel file without affording a due process hearing.

> We conclude that a proper test in determining whether reinstatement is the proper remedy for a violation of the teacher evaluation statutes or the collective bargaining agreement is whether a grievant has shown that the violation substantially and directly impaired his or her ability to improve himself or herself and attain continuing contract status.[93]

A nontenured teacher in Arizona alleged denial of a liberty interest when denied notice and hearing prior to nonrenewal for "apparent emotional instability." The court held that since the accusation referred to a "serious character defect," there was a violation of a liberty interest that gave the teacher a right to a hearing.[94] However, the court held that the violation was merely one of procedural due process, and the remedy for such a violation could not be reinstatement, although the way was left open for the recovery of damages.[95]

2.3c Aspects of Notice

Due process is a flexible principle which requires procedural protections consistent with the demands of specific employment situations. Compliance with aspects of procedural due process will often depend upon a court's interpretation of federal and state constitutional standards, statutes, agency regulation and local board policies. As indicated previously, the nature of the liberty interest or property right involved will also influence the question of compliance with due process procedures.

A tenured teacher discharged for cause is entitled to a written statement of the reasons for the determination and a summary of the evidence relied upon. In interpreting the due process standards of the United States Constitution's Fourteenth Amendment and the administrative laws and procedures of state statutes, the Supreme Court of Connecticut held that a school board's failure to state the reasons for discharge and the evidence relief upon with sufficient particularity violated a tenured teacher's due process rights.[96] In a similar ruling by the Louisiana Court of Appeals, a teacher protected by the state tenure law was entitled to reinstatement and backpay when the school board failed to meet notice requirements in effectuating her dismissal.[97] The school board's contentions that the teacher's claim should be dismissed for failure to assert a timely claim and, alternatively, that the teacher actually abandoned her teaching position for other employment, were not convincing.

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[92] *Id.*
[93] *Id.* at 879.
[94] Bomhoff v. White, 526 F. Supp. 488 (D. Ariz. 1981).
[95] *Id.* at 491.

A probationary teacher does not normally enjoy the degree of due process protection afforded a tenured or continuing contract employee because the probationary teacher has no property right that extends beyond the period of the probationary contract. However, an expectancy of reemployment can be created where state statutes or school district personnel policies require notice of nonrenewal. A probationary music teacher sought to recover a year's backpay when the school board gave no notice of nonrenewal and acted upon evidence which was not disclosed to the teacher. The Supreme Court of Arkansas granted recovery, pointing out that the school district's personnel policies required notice and finding tht the board had acted without even colorable compliance with its own declared policies.[98] An Illinois school district was held to have failed to comply with a requirement that the teacher receive written notice of nonrenewal sixty days prior to the end of the school term despite the fact that the board sent the notice sixty days prior to the end of the school term.[99] A California statute requiring notice to a principal before possible release from a position was held to apply to reassignment to another administrative position and reinstatement plus attorney's fees were awarded for what the court described as "an arbitrary and capricious action."[100]

Situations involving a school board's failure to follow employee evaluation procedures can often be characterized as a lack of compliance with appropriate due process. West Virginia's State Board of Education prohibits a local board from discharging, demoting or transferring an employee for reasons of incompetency where the incompetence has not been brought to the attention of the employee through performance evaluations.[101] The state supreme court affirmed reinstatement of a director of federal programs after finding that the local board failed to establish compliance with the state's evaluation policies.[102] Said the court,

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[96] Lee v. Board of Educ. of City of Bristol, 434 A.2d 333 (Conn. 1980).

[97] Jackson v. St. Landry Parish School Sys., 407 So. 2d 51 (La. Ct. App. 1981).

[98] Maxwell v. Southside School Dist., 618 S.W.2d 148 (Ark. 1981). *But see* McElroy v. Jasper School Dist., 617 S.W.2d 356 (Ark. 1981), where probationary teacher had no entitlement to notice absence a notice policy of board.

[99] People *ex rel.* Head v. Board of Educ., 419 N.E.2d 505 (Ill. App. Ct. 1981). *See also* Humphreys v. Bethel School Dist., 636 P.2d 463 (Or. App. 1981).

[100] Ellerbroek v. Saddleback Valley Unified School Dist., 177 Cal. Rptr. 910, 913 (Cal. Ct. App. 1981).

> While the evidence would support a finding that the superintendent and Trimboli discussed the need to prepare certain reports at an earlier time during the school year, it does not support a finding that the superintendent ever put Timboli *on notice* that he was being evaluated, that his performance was unsatisfactory, and that unless he performed his job differently he would be subject to adverse personnel action. In these circumstances we are unable to find that Trimboli was evaluated and given an opportunity to improve his job performance prior to transfer in compliance with the requirements of Rule 5300(6)(a). (emphasis added)[103]

Where a school board's employment decision is based upon valid statutory authority, substantially complies with procedural requirements of the law and the employment decision is a discretionary action carried out in a nonarbitrary fashion, courts have affirmed the school board's action.[104] Notice of an adverse employment decision has been held sufficient despite inept wording where the court found substantial compliance with required statutory standards.[105] A statutory requirement that written notice of alleged incompetency be given "during the preceding term or half school year" prior to filing a dismissal charge was held to refer to half an education year, not half a fiscal year, and the school district's written notice to a discharged teacher was held to be timely.[106]

The sufficiency of notice in an adverse employment decision has been held adequate to meet state statutory standards in a number of cases. In Oregon, notice of nonrenewal was sufficient where the school board's draft minutes, seen and edited by the nonrenewed superintendent prior to the statutory deadline for notice of nonrenewal contained the results of the board's vote not to renew.[107] In Arizona, notice of an executive session of the board, which informed all probationary teachers that their contracts would be discussed, constituted reasonable notice of an intent to consider employment matters under the requirements of the state open meetings law.[108] In Wyoming adequate notice of nonrenewal was created by reference to the terms of a teacher's employment contract where the contract specified "one year only" expressly stated that the teacher was hired as a substitute to replace a teacher given a one-year maternity leave.[109]

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[101] West Virginia Bd. of Educ. Rule 5300(6)(a) as cited in Trimboli v. Board of Educ. of Wayne Cty., 280 S.E.2d 686, 688 (W. Va. 1981).

[102] Trimboli v. Board of Educ. of Wayne Cty., 280 S.E.2d 686 (W. Va. 1981).

[103] *Id.* at 689. *See also* Lehman v. Board of Educ of City of New York, 439 N.Y.S.2d 670 (N.Y. Sup. Ct. 1981), where right to notice and evaluation prior to nonrenewal were "substantial rights" which could not be waived by administrative agency seeking to discontinue a probationary teacher's services.

[104] Kolp v. Board of Trustees of Butte Cty., 629 P.2d 1153 (Idaho 1981).

[105] Chapman v. Hamburg Pub. Schools, 625 S.W.2d 477 (Ark. 1981); Allred v. Littie Rock School Dist., 625 S.W.2d 487 (Ark. 1981).

[106] McKee v. Commission on Professional Competence, 171 Cal. Rptr. 81 (Cal. Ct. App. 1981).

2.3d Aspects of Hearing

In the absence of a statute or regulatory requirement, a probationary teacher is not entitled to a hearing on request to dispute a timely notice of nonrenewal.[110] However, a state statute or the personnel regulations of the school board may be interpreted to grant the right to a hearing and may compel specific procedural protections that would not otherwise be required under the due process clause.[111] Nevertheless, a breach of these state due process standards, specifically the failure to provide a conference dealing with unsatisfactory performance prior to discharge, will not necessarily constitute a violation of due process under the Fourteenth Amendment.[112]

To receive the full due process rights to notice and a hearing available under the Fourteenth Amendment, courts continue to define property entitlements in accordance with the interpretation of state law. A principal's right to a pre-transfer hearing under Kentucky tenure laws was upheld where the transfer to a noncertified administrative position amounted to termination as a teacher.[113] Mid-year reassignment to a nonadministrative position without prior notice and a hearing was considered a deprivation of a property interest cognizable under Texas school laws and hence a denial of due process, although a hearing subsequent to reassignment operated to mitigate damages and preclude reinstatement.[114]

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[107] Ambrose v. Board of Educ., 626 P.2d 916 (Or. Ct. App. 1981).

[108] McCown v. Patagonia Union High School Dist., 629 P.2d 94 (Ariz. Ct. App. 1981).

[109] Borman v. Sweetwater Cty. School Dist. No. 2, 627 P.2d 1364 (Wy. 1981). *See also* Gragg v. Unified School Dist. No. 287, 627 P.2d 335 (Kan. Ct. App. 1981), where a school board was not bound by a contractual provision which required notice of nonrenewal at an earlier date than that set forth by statute.

[110] Tibbs v. Fischer, 302 N.W.2d 293 (Neb. 1981); Boyd v. Alabama State Tenure Comm'n, 406 So. 2d 438 (Ala. Civ. App. 1981).

[111] Fullerton v. Southside School Dist., 613 S.W.2d 827 (Ark. 1981). *But see* Wollenzien v. Board of Educ. of Manson, 297 N.W.2d 215 (Iowa 1981), where under statute providing that dismissed school teacher could reject an adjudicator's decision by notifying the school board's secretary in writing within ten days of filing of decision, the adjudicator's decision became final and binding when it was not rejected by teacher within ten days and the decision was not subject to later appeal.

[112] Atencio v. Board of Educ., 658 F.2d 774 (10th Cir. 1981). *See also* Johnson v. School Bd. of Palm Beach, 403 So. 2d 520 (Fla. Dist. Ct. App. 1981), where suspension without pay pending a dismissal proceeding does not require a presuspension hearing.

[113] Crawley v. Board of Educ. of Marion Cty., 658 F.2d 450 (6th Cir. 1981).

Certain procedural aspects of the hearing have been given close scrutiny by state courts. A former principal, who alleged that he was wrongfully terminated by the school board, contended that he was denied due process when his contract was not renewed for reasons related to lack of cooperation and insubordination. In concluding that the employee had been treated fairly, the Utah Supreme Court noted that a school board need not offer the due process requirements of one accused of a crime.[115] In this instance, the principal was granted an informal and formal hearing before the board, and afforded the right to examine and cross-examine witnesses and offer documentary evidence. Following an official vote and decision at an open meeting of the board, a letter was prepared and furnished to the principal which set forth the views of the majority of the board consistent with charges against the principal justifying the refusal to renew his contract.

In Michigan, a tenured teacher dismissed after notice and a hearing before the school board claimed a denial of due process in that the board's attorney presented the case against the teacher and served as an advisor to the board. No prejudice was found, however, because the court found that the attorney who presented the case, and served at the same time as legal advisor to the board, refrained from actively advising and the board consulted with another attorney when it encountered disagreement between its legal counsel and teacher's attorney.[116]

A superintendent who sought judicial review of his contract termination contended a denial of due process in that board members had conducted independent investigations and heard complaints about the plaintiff prior to the board decision to consider termination. The Supreme Court of Iowa held for the board, noting that in the performance of duties board members would necessarily be exposed to facts and allegations, but such exposure does not violate due process guarantees of a fair hearing.[117]

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[114] Thomas v. Board of Trustees of Galveston Indep. School Dist., 515 F. Supp. 280 (S.D. Tex. 1981).

[115] Elwell v. Board of Educ. of Park City, 626 P.2d 460 (Utah 1981).

[116] Niemi v. Board of Educ. of Kearsley, 303 N.W.2d 905 (Mich. Ct. App. 1981).

[117] Wedergren v. Board of Directors, 307 N.W.2d 12 (Iowa 1981).

2.4 DISMISSAL AND DISCIPLINE

It is well settled that courts may review the adverse employment decisions of school boards or administrative agencies to insure compliance with statutory requirements or evidentiary standards of proof.[118] While a court is reluctant to substitute its determination for that of a school board,[119] evidence that the board acted arbitrarily and capriciously[120] or failed to make findings of fact to support its employment decision[121] would justify court intervention. In general, a school board's power to dismiss a professional employee must be based on state statutory authority,[122] elaborating grounds for dismissal supported by substantial evidence.[123] Among the remedies for a wrongful dismissal or nonrenewal, the employee may claim reinstatement and award of back pay.[124]

What constitutes substantial evidence for dismissal or discipline will depend on the facts and circumstances giving rise to a particular case. In Iowa, a hearing officer's decision finding no just cause for a principal's dismissal was overturned by a school boad which found evidence to support dismissal for incompetency, insubordination and unsuitable administrative methods. The reviewing court recognized the "necessarily flexible nature" of just cause in a termination, holding that where a reasonable mind would accept the evidence as adequate to reach a conclusion the standard of substantial evidence is met.[125]

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[118] *See generally*, Ronkese v. Board of Educ. of Highland Cent., 442 N.Y.S.2d 176 (N.Y. Sup. Ct. 1981), testimony of supervisor and witnesses afforded substantial evidence to support termination of school bus driver for unsafe driving; Eskew v. Kanawha Cty. Bd. of Educ., 280 S.E.2d 297 (W. Va. 1981), dismissal subject to judicial review; Tombler v. Board of Educ., 440 N.Y.S.2d 1012 (N.Y. Sup. Ct. 1981).

[119] Dobervich v. Central Cass Pub. School Dist., 302 N.W.2d 745 (N.D. 1981).

[120] Knollmiller v. Welch, 623 P.2d 823 (Ariz. Ct. App. 1981).

[121] Powers v. Currituck Cty. Bd. of Educ., 279 S.E.2d 8 (N.C. Ct. App. 1981).

[122] *See* Tutwiler v. Jones, 394 So. 2d 1346 (Miss. 1981), where board authority to dismiss superintendent could be presumed from statute giving board power to dismiss other enumerated school district employees for cause.

[123] *See* Ricci v. Davis, 627 P.2d 1111 (Colo. 1981), where board may review findings of fact to determine if supported by competent evidence; Alabama State Tenure Comm'n v. Tuscaloosa Cty. Bd. of Educ., 401 So. 2d 84 (Ala. Civ. App. 1981), where evidence adduced at hearing was held not sufficient to justify teacher's termination. *But see* Sluley v. Board of Educ. of Jefferson Cty. School Dist., 633 P.2d 482 (Colo. Ct. App. 1981), where hearing panel's finding of insufficient evidence for just cause to dismiss was not binding in school board's decision to place teacher on probationary status.

[124] Shearer v. Commonwealth, Secretary of Educ., 424 A.2d 633 (Pa. Commw. Ct. 1981), *but see* Neal v. Board of Educ. of School Dist. No. 189, 417 N.E.2d 217 (Ill. App. Ct. 1981), award of back pay denied where school board had a duty to reinstate teacher but had no affirmative duty to contact teacher about reassignment.

[125] Cook v. Plainfield Commun. School Dist., 301 N.W.2d 771, 772-73 (Iowa Ct. App. 1981).

Underlying the complaint were a number of allegations that the principal undermined the superintendent of the district through lack of cooperation and overt opposition to programs. What the hearing officer concluded was slowness in response to directives could reasonably be considered insubordination, incompetence and inattention to duties, thus the school board's decision was affirmed.[126]

1.4a Insubordination

Where a school employee willfully refuses to follow the reasonable rules or regulations established by the school board or a superior, the charge is insubordination. In a series of decisions affirming the evidentiary sufficiency of contract cancellations under Alabama law, teachers were found insubordinate for refusal to follow rules established by the physical education department head,[127] refusal to attend an enrichment program,[128] and refusal to obey a guidance counselor's reasonable request to return to the classroom.[129] In Kentucky, a former principal's unwillingness to act promptly on the school superintendent's directives constituted sufficient cause for demotion to teacher status.[130]

A nonteaching employee's conduct in destroying a copy of an evaluation of her work performance was not "gross insubordination" under Florida law. The incident occurred after school hours when the employee was presented with an overall unsatisfactory rating by her superior. The employee destroyed the evaluation copy, threw it at her superior and said, "This is what I think of this and you too." The court held that the incident was an isolated outburst which could not be considered so "constant and continuing" as to be deemed gross insubordination, particularly in view of the fact that the record did not establish that the employee refused to obey an order of the superior.[131]

The use of unauthorized corporal punishment resulted in several decisions disciplining or dismissing teachers. Two instances in which an Illinois elementary school teacher physically struck students on the head were established by the testimony of school employees and were sufficient to support discharge where the school's rules expressly prohibited corporal punishment.[132] The testimony of two witnesses corroborated incidents of corporal punishment sufficient to justify dismissal in a North Dakota case in which the dismissed teacher had received a warning from administrators not to use force in disciplining students.[133]

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[126] *Id.*

[127] Aaron v. Alabama State Tenure Comm'n, 407 So. 2d 136 (Ala. Civ. App. 1981).

[128] Howell v. Alabama State Tenure Comm'n, 402 So. 2d 1041 (Ala. Civ. App. 1981).

[129] Heath v. Alabama State Tenure Comm'n, 401 So. 2d 68 (Ala. Civ. App. 1981), *cert. denied*, *Ex parte* Heath, 402 So. 2d 72 (Ala. 1981).

[130] Miller v. Board of Educ. of Hardin Cty., 610 S.W.2d 935 (Ky. Ct. App. 1981).

[131] Smith v. School Bd. of Leon Cty., 405 So. 2d 183 (Fla. Dist. Ct. App. 1981).

[132] Board of Educ. of City of Chicago v. State Bd. of Educ., 427 N.E.2d 368 (Ill. App. Ct. 1981). The court found the use of corporal punishment not remediable, thus failure to give written notice of charge did not constitute grounds for reinstatement. *Id.* at 372. *See also* Carter v. State Bd. of Educ., 414 N.E.2d 153 (Ill. App. Ct. 1981), where corporal punishment was found to be an irremediable cause for dismissal.

2.4b Unprofessional Conduct

Charges of "conduct unbecoming a teacher" or "unprofessional conduct" have undergone careful court scrutiny as a basis for dismissal since such charges permit a wide range of allegations related to a school employee's performance. Circumstantial evidence that a tenured teacher improperly prepared her students for the vocabulary portion of a standardized achievement test by reviewing words that were frequently part of the test was held insufficient to justify dismissal in New York.[134] Similarly, the Supreme Court of Minnesota ruled that substantial evidence did not support a school board's decision to immediately discharge a teacher alleged to have held pins under the arms of a disciplined child for the purpose of preventing the child from lowering his arms.[135] The highly variable discrepancies in the testimony of witnesses and the dismissed teacher's unblemished record of satisfactory performance were factors influencing the court's decision to overturn the school board's discharge.[136]

Charges of "unprofessional conduct" were not considered void for vagueness in cases where the manifest weight of evidence sustained the charge. Testimony establishing a pattern of persistent, disruptive behavior with colleagues, which interfered with efficent school operation, was held a reasonable basis for dismissal on the grounds of "conduct unbecoming a teacher" in Massachusetts.[137] The South Dakota Supreme Court upheld dismissal for "failure to adhere to proper school policy" where official school personnel files contained documentation replete with examples of the teacher's failure to follow policies and the teacher's submitted response acknowledged occurrence of each event.[138] An Iowa school board's decision to terminate a teacher's contract was supported by a preponderance of the evidence where the evidentiary record included evidence of problems in dealing with students, parents and school administrators.[139] The evidence included reports by students and parents of numerous incidents in which the teacher had verbally threatened and intimidated students and evaluations by the principal which showed a steady decline in rapport with and ability to motivate students.[140]

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[133] Lithun v. Grand Forks Pub. School Dist., 307 N.W.2d 545 (N.D. 1981).

[134] Altsheler v. Board of Educ. of Great Neck, 441 N.Y.S.2d 142 (N.Y. Sup. Ct. 1981).

[135] Kroll v. Independent School Dist. No. 593, 304 N.W.2d 338 (Minn. 1981).

[136] *Id.* at 342.

[137] Springgate v. School Comm. of Mattapoisett, 415 N.E.2d 808 (Mass. App. Ct. 1981).

[138] Tschetter v. Doland Bd. of Educ., 302 N.W.2d 43 (S.D. 1981).

[139] Fay v. Board of Directors of North-Linn, 298 N.W.2d 345 (Iowa Ct. App. 1980).

Often, the charge of unprofessional conduct subsumes an allegation related to commission of an illegal act. A charge of knowingly exhibiting to students an unauthorized film of a pornographic nature justified dismissal in New York.[141] In a case with similar factual circumstances, the West Virginia Supreme Court remanded a case in which a tenured Virginia Supreme Court remanded a case in which a tenured teacher was dismissed for passing out sample art work containing curse words and depicting cartoon characters in stages of undress.[142] The court sought a determination of whether or not the teacher's action was intentional or inadvertent.[143] In a case from Arkansas, a teacher's dismissal for making offers of higher grades to students in exchange for purchase of raffle tickets was upheld on the ground of unprofessional conduct even absent a specific school board policy prohibiting solicitation.[144] The misrepresentations of a school employee are often cited as a basis for dismissal for unprofessional conduct.[145] In Florida, a systems analyst was discharged for willful misconduct for misrepresenting to his supervisor that he was unable to work for medical reasons when he was actually operating a private business on school hours.[146]

1.4c Immorality

Conviction of a felony is often a sufficient cause for dismissal on the basis of immorality. A tenured teacher found guilty of larceny in the second degree (felony conviction) was terminated by a Connecticut school board although no showing of affect on students was established. The Connecticut Supreme Court held the board could properly conclude that good cause existed for termination.[147] The alternative view, which requires a finding of fact as to a convicted teacher's fitness to continue teaching, was recognized by the Supreme Court of Washington when it remanded a dismissed teacher's case for an evidentiary hearing on fitness to teach.[148]

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[140] *Id.* at 348-49.

[141] Shurgin v. Ambach, 442 N.Y.S.2d 212 (N.Y. Sup. Ct. 1981).

[142] De Vito v. Board of Educ., 285 S.E.2d 411 (W. Va. 1981).

[143] *Id.*

[144] Gatewood v. Little Rock Pub. Schools, 616 S.W.2d 784 (Ark. Ct. App. 1981).

[145] *See* Honore v. Board of Educ., 435 N.Y.S.2d 353 (N.Y. Sup. Ct. 1981), where a school custodian was discharged for misrepresenting his hours of work, and Ostrolenk v. Louise S. McGehee School, 402 So. 2d 237 (La. Ct. App. 1981), where a private school teacher's omission of her termination at another school justified invalidation of her contract of employment.

[146] Reddick v. Leon Cty. School Bd., 405 So. 2d 757 (Fla. Dist. Ct. App. 1981).

[147] Petrino v. Board of Educ., 426 A.2d 795 (1981). *See also* Kelly v. Levin, 440 N.Y.S.2d 424 (N.Y. Sup. Ct. 1981), where conviction of grand larceny for theft of school property justified school business administrator's termination.

Revocation of teaching certificte was justified in a Florida case involving an allegation of moral turpitude. A police officer in hot pursuit of vandals entered the teacher's residence and observed some fifty-two marijuana plants. State revocation of teaching certificate was justified on the basis of substantial evidence of illegal possession.[149] However, where a guidance counselor pled *nolo contendere* to a petty theft (shoplifting misdemeanor) the West Virginia Supreme Court ruled that the requisite nexus between misconduct and the teacher's inability to perform duties had not been established.[150]

In Illinois, a teacher charged with public indecency for allegedly making improper advances to a plainclothes sheriff won a directed verdict of not guilty when the state failed to properly plead all elements of the case. The school board had dismissed the teacher for immorality, after a determination that the crime caused irreparable harm to students due to its notorious nature. A hearing officer was reversed on appeal when he concluded the board failed to establish the charges by a "clear and convincing level of proof." The appellate court remanded the case for application of the preponderance of evidence standard of proof.[151]

In a Pennsylvania case, a school principal's reinstatement with back pay was affirmed where findings of fact resulted in the Commissioner of Education's determination that the principal's storage of school stereo equipment in his home and office did not constitute misappropriation of property.[152]

Inappropriate conduct with students, particularly where that conduct relates to sexual improprieties, remains a typical basis for dismissal based on immorality. A male teacher's sexually exploitive statements to female students during the school day was supported by sufficient evidence to justify discharge under Washington law.[153] A Florida teacher's certificate was initially suspended where a police report provided evidence to establish that the teacher, clad only in trousers and socks, was found with a female student in the backseat of his car. In reversing, the Florida court ruled that the evidence of impropriety was not sufficient to justify suspension.[154]

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[148] Hoagland v. Mt. Vernon School Dist., 623 P.2d 1156 (Wash. 1981).

[149] Adams v. State Professional Practices Council, 406 So. 2d 1170 (Fla. Dist. Ct. App. 1981).

[150] Golden v. Board of Educ. of Harrison Cty., 285 S.E.2d 665 (W. Va. 1981).

[151] Board of Educ. v. Adelman, 423 N.E.2d 254 (Ill. App. Ct. 1981).

[152] Carmichaels Area School Dist. v. Harr, 429 A.2d 126 (Pa. Commw. Ct. 1981).

[153] Pryse v. Yakima School Dist., 632 P.2d 60 (Wash. Ct. App. 1981).

[154] Jenkins v. State Bd. of Educ., 399 So. 2d 103 (Fla. Dist. Ct. App. 1981).

2.4d Neglect of Duty

A charge involving neglect of duty or persistent negligence cannot be sustained unless it can be established that a reasonably prudent person under similar circumstances would have recognized the duty and conformed to it. Where a tenured teacher in North Carolina remained away from school pending resolution of a criminal charge brought against him, it was not permissible for the school board to dismiss for neglect of duty, particularly where an examination of the whole record would lead to differing opinions as to the breach of a reasonable standard of care on the part of the teacher.[155] On the other hand, conduct of a teacher which is so constant and continuing as to reflect a persistent refusal to meet a reasonable standard of care would justify dismissal for persistent negligence. Such a dismissal was upheld in Pennsylvania where the record established the teacher regularly failed to maintain grade books required by the supervisor, failed to maintain lesson plans, disobeyed directives, and was hostile and abusive to his supervisors.[156]

2.4e Incompetency

Although strict adherence to the rules of evidence is not required in an administrative proceeding considering good cause for dismissal, basic fairness requires that evidence be carefully considered when a professional employee's property or liberty interests hang in the balance. A finding of substantial evidence to justify termination is less likely to be sustained on appeal where the record illustrates that the adverse employment decision involved conflicting and contradictory evidence.[157] These propositions are particularly applicable in cases involving allegations of a professional employee's incompetency, since few objective standards for measuring or evaluating competency have been recognized by courts.

In reviewing a school board's decision to terminate a tenured teacher for incompetency, the Supreme Court of Nebraska pointed to hearsay statements of students, contradictions between satisfactory classroom ratings and allegations of incompetent performance and mitigating circumstances in the teacher's conduct in reversing the termination.[158] A detailed review of the record before the school board demonstrated that the teacher had received uniformily praiseworthy classroom evaluations, yet the principal alleged incompetency and lack of rapport.

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[155] Overton v. Goldsboro City Bd. of Educ., 283 S.E.2d 495 (N.C. 1981).

[156] Strinick v. Clairton School Dist., 431 A.2d 267 (Pa. 1981).

[157] *See* County Bd. of Educ. of Shelby v. Alabama Tenure Comm'n, 392 So. 2d 842 (Ala. Civ. App. 1980); Kloepfer v. Ambach, 440 N.Y.S.2d 785 (N.Y. Sup. Ct. 1981).

[158] Hollingsworth v. Board of Educ., 303 N.W.2d 506 (Neb. 1981).

Other findings tended to support the court's view that the administration had undertaken a systematic and diligent search for evidence which would justify an employment decision which had already been reached.[159] The administration's negative evaluations were also suspect because no comparison with other staff member's performance had been made. In the view of the court, "Incompetency or neglect of duty are not measured in a vacuum nor against a standard of perfection, but, instead, must be measured against the standard required of others performing the same or similar duties."[160]

Similar decisions invalidating dismissal for incompetency emphasized lack of evidence of the irremediable nature of the alleged deficiencies or inadequacy of notice required in order that the school employee undertake remediation. Where the alleged incompetent performance is remediable within a reasonable time, West Virginia regulations prohibit dismissal absent a showing that the employee has been afforded an improvement period.[161] A board's failure to establish that a teacher's deficiencies severely damages students or persisted for a sufficient period so as to be incorrectable led to the reversal of a decision to terminate for incompetency in Illinois.[162] Insufficient evidence to justify termination for incompetence and insufficient time between notice of inefficiency and notice of intention to terminate resulted in a Minnesota teacher's reinstatement. The Minnesota Supreme Court considered that a tenured teacher's seventeen years of service in the district would justify more than five weeks after notice of deficiency before the classroom observation that led to a notice of termination.[163]

Termination or removal for incompetency has been upheld where sufficient evidence justified the conclusion that the school administrator failed to provide leadership, was dilatory and uncooperative or was "inept" in handling routine administrative responsibilities. The removal and reassignment of a Mississippi school principal was affirmed where the evidence established that she was unable to properly cope with her responsibility to schedule activities and students.[164] Evidence that an Iowa principal failed to develop and administer an evaluation of teachers and was remiss in reporting eligible students for a special education program contributed to a finding of good cause for dismissal on the basis of incompetency.[165] A teacher's

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159. *Id.* at 513.
160. *Id.* at 512-13.
161. Mason Cty. Bd. of Educ. v. State Supt. of Schools, 274 S.E.2d 435 (W. Va. 1981).
162. Morris v. Board of Educ. of the City of Chicago, 421 N.E.2d 387 (Ill. App. Ct. 1981).
163. Ganyo v. Independent School Dist. No. 832, 311 N.W.2d 497 (Minn. 1981).
164. Holliday v. West Point Mun. Sep. School Dist., 401 So. 2d 1296 (Miss. 1981).
165. Cook v. Plainfield Commun. School Dist., 301 N.W.2d 771 (Iowa Ct. App. 1980).

failure to provide administrative leadership in a special education program and to "establish a stable lunch period" for purposes of scheduling was sufficient to justify discharge for incompetency under Alabama law.[166]

Other adverse employment decisions, including failure to promote and suspension, have been justified on the basis of incompetency. In Iowa, a statutory preference for school district employees did not justify the promotion of a school employee to a position as audiologist where the evidence demonstrated he was possessed of the requisite technical skills but lacked the ability to cooperate and coordinate his activities with others, was often abusive and insulting in professional relations and contributed to discord and dissidence among staff.[167] A teacher's refusal to submit to a required psychological examination to determine competency was a proper basis for a decision to suspend without pay under New York law.[168]

2.5 REDUCTION IN FORCE AND ABOLITION OF POSITION

Of the provisions involved in reduction in force (RIF) policies, preference in retention for senior employees, preference in call-back consideration for reemployment where new positions are created and compliance with school board or state procedures for RIF appear most often as subjects of litigation.

2.5a Procedural Protections

Generally, a school board's rules and regulations adopted to govern its proceedings, where within the delegated authority of the board, are binding on the board. Thus, procedures set forth by a school board for determining staff reductions have the force and effect of law.

A North Dakota Supreme Court decision is illustrative of the interpretation to be given school board policies on retention preference and call-back procedural requirements. A teacher with nine years of experience was not renewed following a serious decline in enrollment. The board's decision not to renew was affirmed since the teacher with less tenure than she was kept on the teaching staff following her nonrenewal.[169] Further, the court held the board's policy that "staff members who have lost their positions because of this policy may request and be given consideration for reemployment if a vacancy for which they are qualified should occur" was not violated when the school board failed to rehire her for a library vacancy since the teacher did not request reemployment.[170]

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[166] Pratt v. Alabama State Tenure Comm'n, 394 So. 2d 18 (Ala. Civ. App. 1980).

[167] Bishop v. Keystone Area Educ. Agency, 311 N.W.2d 279 (Iowa 1981).

[168] McNamara v. Commissioner of Educ., 436 N.Y.S.2d 406 (N.Y. App. Div. 1981), *but see* Buchan v. Las Virgenes Unified School Dist., 177 Cal. Rptr. 788 (Cal. Ct. App. 1981), where continued suspension for refusal to submit to repeated or additional psychological testing in the absence of a finding of mental incompetency could not be justified.

Courts appear reluctant to intervene in administrative determinations involving RIF, and absent a showing of bad faith or arbitrary and capricious action, abstain from reviewing cases in which administrative remedies have not been exhausted. While it is essential that the board provide procedural due process hearings to teachers affected by RIF,[171] a Pennsylvania school board's showing of a substantial decline in student enrollment was held proper as a basis for suspensions without extensive judicial scrutiny of the latter finding.[172] A decision by the Commissioner of Education for the State of New York, denying reemployment as an assistant senior high school principal to an assistant junior high school principal whose poisition was abolished, was affirmed without inquiry where the Commissioners had found the positions were not within the same tenure area and lacked similarity.[173] The Supreme Court of Connecticut refused to grant the procedural protections available to "dismissed" public employees to three school administrators reassigned due to declining enrollment to lower paying teaching positions.[174] In refusing to consider a similar reassignment from administrative to teaching duties due to declines in enrollment, Pennsylvania's Commonwealth Court held the proper procedure would be for the employee to exhaust administrative remedies through appeal to the school board.[175]

State statutory standards involving the layoff of school employees have regularly required judicial review and interpretation. By way of illustration, statutory provisions in California governing the layoff of certified employees are extremely complex. The California District

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[169] Fercho v. Montpelier Pub. School Dist. No. 14, 312 N.W.2d 337 (N.D. 1981).

[170] *Id.* at 340. *See also* Hession v. Board of Educ., 443 N.Y.S.2d 1010 (1981), where teacher's timely exercise of rights under statute governing RIF would compel board to follow procedures thereby mandated and burden of proof would be on board to prove inability to provide teacher a position.

[171] Rubtchinsky v. Moriah Cent. School Dist., 440 N.Y.S.2d 370 (N.Y. Sup. Ct. 1981).

[172] Andresky v. West Allegheny School Dist., 437 A.2d 1075 (Pa. Commw. Ct. 1981).

[173] Kelly v. Ambach, 442 N.Y.S.2d 616 (N.Y. Sup. Ct. 1981), *but see* Klein v. Deer Park Union Free School Dist., 441 N.Y.S.2d 922 (N.Y. Sup. Ct. 1981), where "expectable duties" for elementary school principal and assistant elementary school principal were virtually identical.

[174] Candelori v. Board of Educ. of New Britain, 428 A.2d 331 (Conn. 1980).

[175] Shestack v. General Braddock Area School Dist., 437 A.2d 1059 (Pa. Commw. Ct. 1981).

Court of Appeal has attempted to resolve questions as to who must be counted as a certificated employee of the district and how "attrition" is to be determined.[176]

2.5b Retention and Seniority

When reducing teaching staff, a school district if often required to retain its most senior teachers. Where such a retention is possible through a reasonable realignment of personnel, the district may be compelled to realign teachers. However, a district is not required to realign teachers where the realignment would be impractical or might jeopardize adequate instruction in subjects deemed essential to the curriculum.

Impractical realignment would not appear to include allegedly "major problems in administration" where a senior teacher in New York was able to obtain temporary certification in other subjects and requested reassignment within those areas of certification by June 15th prior to the upcoming school year.[177] However, realignment plans proposed by a suspended science teacher, which included the transfer of another science teacher with certification to teach French and English and the replacement of another teacher with five years of expereience was upheld as impractical and unreasonable in Pennsylvania.[178] "Reasonable effort" to realign teaching faculty would not require a school district to shuffle teachers about to create a vacancy which a displaced teacher could potentially fill if given an opportunity to upgrade his qualifications.[179]

Ordinarily, no effort to realign staff or teaching faculty to accommodate a suspended employee would be required where there was a showing that no position exists for which the professional employee was certified or qualified. In Pennsylvania, a guidance counselor, suspended when program funds were cut-off, was properly denied the right to seniority status when the board established that no position existed for which he qualified.[180] A business education teacher in New York, who was certified in academic subjects but had never taught academic subject matter, was found to be in a special or vertical tenure area and, as such, could be suspended instead of less senior academic teachers when declining enrollment in his subject was established.[181]

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[176] Santa Clara Fed'n of Teachers v. Santa Clara Unified School Dist., 172 Cal. Rptr. 312 (Cal. Ct. App. 1981); Brough v. El Segundo Unified School Dist., 173 Cal. Rptr. 729 (Cal. Ct. App. 1981).

[177] Hession v. Board of Educ. of Town of Webb, 443 N.Y.S.2d 1010 (N.Y. Sup. Ct. 1981).

[178] Proch v. New Castle Area School Dist., 430 A.2d 1034 (Pa. Commw. Ct. 1981).

[179] Shandy v. Portland School Dist., 634 P.2d 1377 (Or. Ct. App. 1981).

[180] Cadonic v. Northern Area Special Purpose Schools, 426 A.2d 186 (Pa. Commw. Ct 1981).

2.5c Basis for Suspension

Three Pennsylvania cases present the question of whether a school board may legally suspend a tenured professional employee for financial reasons alone without establishing any other statutory basis for suspension. In each case, an equally divided Supreme Court of Pennsylvania affirmed the decision of the lower court reinstating the employee. The basis for each suspension was tied to a school board's reorganization or elimination of programs based on projected budget deficits. While the decisions are of questionable precedential weight, suspensions based on financial reasons alone, without establishing a statutory basis (such as declining enrollment) for the RIF, would appear to be legally suspect in Pennsylvania.[182]

Three cases involving allegations of bad faith on the part of school boards were not sustained on judicial review of suspensions or reassignments based on RIF. A New York court was reluctant to second-guess a board's decision to create two three-quarter time positions and offer one to a physical education teacher who was on half-time status when the position vacancy occurred. The teacher contended that he should have been given full-time employment when the vacancy was created, but the court concluded that no basis for finding bad faith existed where the teacher had been increased in employment time and remained on the preferred list for any full-time vacancy.[183] A director of continuing education in New York failed to sustain the burden of showing bad faith where a school board abolished his position and divided his duties among five other administrators to effect economic savings.[184] An Illinois appellate court was unwilling to find bad faith in curriculum modifications, which were alleged to "fractionalize" tenure rights, absentee proof of a pattern of reassignments designed to subvert the rights of tenured teachers.[185]

2.5d Call-Back Rights

Many states make provision for a professional employee whose position has been abolished or consolidated to be placed on a preferred eligibility list and recalled in the event of a vacancy.[186] An amended New York statute providing for a six-year right of recall gave a half-time home economics teacher a right to a full-time position when her half-time position was merged with an additional half-time teaching position in the district.[187] However, a suspended school employee with preferred eligibility would not appear to be entitled to a vacancy created when another employee took a short-term leave of absence,[188] nor could suspended Illinois school employees be reinstated to positions they were not legally qualified to hold.[189] Finally, a tenured physical education teacher in New York, whose position had been reduced to half-time status and was subsequently increased to three-quarter time when two three-quarter time physical education positions were created after a second full-time physical education teacher resigned, was unsuccessful in his attempt to compel the school district to reinstate him to the full-time position, although his name was continued on the preferred eligibility list after being increased to three-quarter time status.[190]

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[181] Rohin v. Board of Educ. of East Rockaway, 443 N.Y.S.2d 192 (N.Y. Sup. Ct. 1981).

[182] *See* Eastern York School Dist. v. Long, 430 A.2d 267 (Pa. 1981); Warwick Bd. of School Directors v. Theros, 430 A.2d 268 (Pa. 1981); and Cumberland-Perry Area Voc.-Tech. School v. Brinser, 430 A.2d 276 (Pa. 1981).

[183] Zurlo v. Ambach, 442 N.Y.S.2d 486 (N.Y. 1981).

[184] Currier v. Tompkins-Seneca-Tioga Bd. of Coop. Educ. Servs., 438 N.Y.S.2d 605 (N.Y. Sup. Ct. 1981).

[185] Higgins v. Board of Educ., 428 N.E.2d 1126 (Ill. App. Ct. 1981).

2.6 CONTRACTUAL DISPUTES

A contract of employment negotiated between school district and employee is subject to provisions of state statutes and administrative regulations as well as the express or implied terms of the agreement itself.

2.6a State Statutory Provisions

A professional employee who alleges a school district's failure to comply with state statutory provisions governing employment contracts will normally carry the burden of proving noncompliance.[191] California teacher aides, who were nonrenewed due to financially exigent conditions within the district, were unsuccessful in establishing a right to continued employment based on state statutes governing notice and layoff of classified employees since the aides were not considered to come within the protection of the act.[192] Where prospective principals unsuccessfully sought to require a school board to appoint by rank order as determined by scores on administrative examinations, the Supreme Court of Illinois interpreted statutory mandates requiring appointment "for merit only" to permit the local board to exercise discretion in the appointment of principals.[193] A Texas state law prohibiting nepotism did not apply to a superintendent whose spouse was employed within the district, since the court held the superintendent was not a state officer within the meaning of the anti-nepotism law.[194] However, a wrongfully dismissed teacher was considered to be "retained" within the meaning of an Alaska statutory provision granting continued employment to teachers within a state controlled educational system transferred to a newly created local district.[195]

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[186] Evidence that a vacancy exists casts no mandatory duty upon the school board to fill it, even when tenured teacher, whose position was abolished, was available and willing to fill it. Lynch v. Board of Educ., 438 N.Y.S.2d 351 (N.Y. App. Div. 1981).

[187] Middleton v. Board of Educ. of South Jefferson, 441 N.Y.S.2d 371 (N.Y. Sup. Ct. 1981).

[188] Brewer v. Board of Educ. of Plainview-Old Bethpage, 433 N.Y.S.2d 1009 (N.Y. 1980).

[189] *See* Herbach v. Board of Educ., 419 N.E.2d 456 (Ill. App. Ct. 1981), and Newman v. Board of Educ., 424 N.E.2d 1331 (Ill. App. Ct. 1981).

[190] Zurlo v. Ambach, 442 N.Y.S.2d 483 (N.Y. 1981).

[191] Samuels v. White Shield Pub. School Dist., 297 N.W.2d 421 (N.D. 1981).

State statutory requirements controlling reassignment after leave of absence and automatic renewal of the employment agreement were broadly interpreted to favor school districts in cases from Louisiana and Oklahoma. In the Louisiana case, statute provided for return "to the same position" after a leave of absence. When a teacher was reassigned to teach language in a different school after serving three years as a reading teacher, she sought to compel the school board to return her to her former duties. The court interpreted "position" in the broader context of "teacher" and refused to require the district to assign the teacher to teach reading upon return from sabbatical leave.[196] In interpreting an Oklahoma statute providing for reinstatement with "full employment status and benefits" the Oklahoma Supreme Court concluded that a board's refusal to reinstate a teacher to a coaching position was permissible, provided that the teacher receive a contract on the same salary level as other teachers in the district were to receive for the ensuing year.[197]

The subordinate status of a contractual agreement, when in conflict with the provisions of state statute, has regularly been recognized by courts. In a Pennsylvania case in which a teacher, tenured in another school district, sought to require a second district to continue her in a position in which she replaced an employee absent on leave, the

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[192] California School Employees v. King City Union Elem. School Dist., 172 Cal. Rptr. 368 (Cal. Ct. Ap. 1981).

[193] Maiter v. Chicago Bd. of Educ., 415 N.E.2d 1034 (Ill. 1980).

[194] Pena v. Rio Grande City Consol. School Dist., 616 S.W.2d 658 (Tex. Civ. App. 1981).

[195] Aleutian Region R.E.A. v. Wolansky, 630 P.2d 529 (Alaska 1981).

[196] Scott v. Dennis, 392 So. 2d 169 (La. Ct. App. 1980).

[197] Maupin v. Independent School Dist. No. 26, 632 P.2d 396 (Okla. 1981).

Commonwealth Court refused to order reinstatement. Although a professional employee contract had been negotiated, the court interpreted school code provisions defining "substitute" to mean that a professional employee could be hired devoid of rights to hearing and dismissal for cause and a professional contract would not be controlling.[198] While agents of a New York school district had made representations that licenses would be granted to teachers holding certificates of continuing eligibility to teach classes for emotionally handicapped children, the court refused to grant the licenses on the grounds that state education statutes provided no license could be validly issued absent a competitive examination.[199]

2.6b Administrative Regulations

Two cases illustrate the application of administrative regulations in situations involving the contractual rights of employees. In West Virginia, an employee handbook promulgated by the State Board of Education provided that employees who met objective eligibility requirements for a vacant professional position had a right to an interview for the position. The court strictly construed the personnel regulations in favor of an employee who had applied for a position as an assistant state superintendent, ordering that the employee be given an interview before any denial of his application.[200] Similarly, a probationary special education teacher in New York relied on regulations promulgated by the chancellor and local board creating a right to be evaluated before discontinuation of her services. The court held that administrative rules which effect substantial rights of employees may not be waived by the agency and ordered evaluation and a new determination regarding continuation of employment.[201]

2.6c Board Policies

A board of education's power to make and enforce policies applicable to employment agreements is discretionary, limited principally by the requirement that the power be exercised in a reasonable manner.

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[198] Bitler v. Warrior Run School Dist., 437 A.2d 481 (Pa. Commw. Ct. 1981). *See also* Eisenstadt v. Ambach, 435 N.Y.S.2d 132 (N.Y. App. Div. 1980), in which a teacher filling in for a tenured teacher on leave does not become a probationary teacher with concomitant rights solely by virtue of the fact that the tenured teacher resigned during the contract period.

[199] Bloomberg-Dubin v. Board of Educ. of the City of New York, 439 N.Y.S.2d 956 (N.Y. App. Div. 1981).

[200] State *ex rel.* Wilson v. Truby, 281 S.E.2d 231 (W. Va. 1981).

[201] Lehman v. Board of Educ. of City of New York, 439 N.Y.S.2d 670 (N.Y. App. Div. 1981).

Normally, the board's power must be exercised within the statutory authority granted to it, for purposes related to the operation of schools. The board's policies should be uniformly applied throughout the district to avoid any allegation of arbitrary or capricious action.

A teacher's transfer, predicated on her refusal to coach basketball, was challenged on the grounds that her contract of employment made no mention of any responsibilities for coaching. While the West Virginia Supreme Court recognized that a school board could negotiate and place conditions on employees, the court insisted that a board must incorporate such conditions in the teacher's written contract.[202] Since the terms of the teacher's written contract did not specify coaching duties, the school board could be considered to have acted unreasonably and arbitrarily in ordering a transfer on contractual grounds for refusal to perform additional duties.[203]

Other courts have found board policy decisions arbitrary and capricious or otherwise unreasonable where unilateral action modifying an employee's contractual rights was taken. A Pennsylvania school district refused to honor a three-year coaching contract, contending that the one-year negotiated agreement between the district and its teachers rendered the coaching agreement "inconsistent" and that the coach's filing of an unfair labor practice claim invalidated the three-year contract. The Commonwealth Court ruled the district had breached the employment agreement in unilaterally declaring the coach's position "open" and the contract had not been rendered invalid.[204] Illinois teachers successfully sued to obtain base salary increases denied to them when the school board imposed a condition subsequent to receipt of a new base salary. The school board was held to have acted arbitrarily and capriciously in denying a base salary increase to tenured teachers who refused to sign contracts for the upcoming academic year.[205] Critical to the court's determination was a finding that the board unilaterally adopted the base salary increase, but never informed teachers that receipt of the increase was conditioned upon the teachers signing the contract.[206]

Public employment contract provisions often establish terms and conditions relative to notice. In interpreting a contract provision which stipulated "failure to notify (employee) in writing no later than sixty . . . days of the contract of the board's intent not to renew the contract will automatically result in an extension of the existing contract," the

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[202] State *ex rel.* Hawkins v. Tyler Cty. Bd. of Educ., 275 S.E.2d 908 (W. Va. 1981).

[203] *Id.* at 914.

[204] Ringgold School Dist. v. Abramski, 426 A.2d 707 (Pa. Commw. Ct. 1981).

[205] Bagley v. Board of Educ. of Seneca, 419 N.E.2d 1165 (Ill. 1981).

[206] *Id.* at 1167.

Supreme Court of Rhode Island affirmed the lower court's opinion that the board's obligation was met if it notified the employee within sixty days after the original contract period ended.[207] A request for a hearing on a breach of contract action was granted however, where a Kansas school board presumed the teacher had failed to accept a proffered contract of employment for a second year of teaching without any opportunity for the teacher to receive notice and a hearing to contest the board's action.[208]

Numerous school board policies have been held to be reasonable directives controlling contracts of employment. Failure to comply with a board's request that the teacher submit medical verification of her ability to resume teaching duties was held to be a reasonable basis for denying salary.[209] A school board policy which required teachers who received full pay while on military leave to turn over to the board payments received for reserve service was upheld in Colorado.[210] However, an Iowa school board policy requiring school employees to combine vacation leave with National Guard training was struck down as violative of a state statute prohibiting discrimination against employees because of membership in the National Guard.[211]

Employee contracts or board policies specifying liquidated damages for an employee's breach of contract have been upheld in a number of cases. A clause which provided for calculation of damages and stipulated reasonable damages for injury resulting from an employee's breach of contract was held enforceable in Kansas.[212] In upholding a similar provision under Illinois law, an appellate court distinguished between reasonable damages, however difficult to ascertain, and penalties imposed upon a party to compel performance, recognizing that the former was within the contractual power of a school board.[213]

Several breach of contract cases brought against school districts have involved interpretation of oral agreements or implied contractual commitments. The adage that "an oral contract isn't worth the paper it is written on," seems to hold true. In Alabama, an oral contract between a clerk-typist and the school board was held to create no property right on which the employee could rely when her position was eliminated due to budget reductions.[214] Similarly, a Mississippi cafeteria manager could not rely on an oral contrct to establish a property right to continued employment and the board could terminate her employment at will.[215] A school board policy providing additional compensation to vocational education teachers who completed certification requirements was relied upon as creating a de facto policy for additional compensation to already certified vocational education teachers in Arizona. The reviewing court denied this reasoning, holding that where the certified teachers signed contracts, which called for specific salaries, the fact that other teachers were paid more was immaterial.[216]

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[207] O'Connor v. McKanna, 425 A.2d 1228 (R.I. 1981). The employee, a former district superintendent, had contended that the contract notice requirement created a probationary period for notice of nonrenewal within the first sixty days of the two-year contract.

[208] Speece v. Unified School Dist. No. 420, 622 P.2d 1202 (Kan. Ct. App. 1981). *But see* Boyd v. Mary E. Dill School Dist., 631 P.2d 577 (Ariz. Ct. App. 1981), where board first voted to renew contract of probationary teachers and subsequently voted not to renew, the subsequent action modified the former decision and the latter action governed.

[209] Kurzius v. Board of Educ., 438 N.Y.S.2d 824 (N.Y. App. Div. 1981).

[210] Colorado Springs Teachers' Ass'n v. School Dist. No. 11, 622 P.2d 602 (Colo. Ct. App. 1980).

[211] Belwey v. Villisca, Iowa Commun. School Dist., 299 N.W.2d 904 (Iowa 1980).

[212] Unified School Dist. No. 315 v. DeWerff, 626 P.2d 1206 (Kan. Ct. App. 1981).

[213] Arbuini v. Board of Educ. of Pontiac, 418 N.E.2d 104 (Ill. App. Ct. 1981). *See also* McNeil v. Park Cty. School Dist., 635 P.2d 818 (Wyo. 1981).

2.7 TENURE

Tenure or continuing contract creates a statutory entitlement to a position. In the absence of a due process proceeding to establish good cause for dismissal or suspension, a school board may be enjoined from summary termination of the employee holding such a property right. A letter of termination sent to tenured teachers informing them that they were being replaced by teachers with more seniority was a violation of due process and ineffective to terminate the teachers' employment rights under Rhode Island law.[217] A school board vote to suspend a tenured teacher for the remainder of the school year and reinstate on probationary status in the next school year was held violative of Alabama's teacher tenure act.[218]

2.7a Status for Determination of Tenure

A school district may hire an employee as a substitute to fill a vacancy until a suitable replacement can be found. The employment status of a substitute teacher does not create an entitlement to continued employment,[219] nor can a teacher normally receive credit for substitute service in establishing a claim for tenured status.[220] However, the employee's status as a substitute must be clear and there must be no evidence of an intent to mislead the employee with respect to that status.[221]

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[214] Tripp v. Hall, 395 So. 2d 33 (Ala. 1981).

[215] Brantley v. Surles, 404 So. 2d 1013 (Miss. 1981). *But see* Monroe v. Oakland Unified School Dist., 170 Cal. Rptr. 867 (Cal. Ct. App. 1981), where hearsay concerning contract representation made to deceased CETA employee was sufficient to uphold finding of breach of contract by school district.

[216] Rothery v. Cantrell, 635 P.2d 184 (Ariz. Ct. App. 1981).

[217] Corrigan v. Donilon, 639 F.2d 834 (1st Cir. 1981).

[218] Hammond v. Bailey, 394 So. 2d 25 (Ala. Civ. App. 1980), *see also* Pulver v. Board of Educ., 436 N.Y.S.2d 340 (N.Y. App. Div. 1981), in which tenured teacher's claim for reinstatement was so central to the vindication of a public interest (tenure rights) that procedural defects would not apply.

Considerations relative to length of service, professional employment, and actual educational functions appear to be primary factors in determining eligibility for tenure. Teachers who were regularly employed by a board of education in a state-funded and legislatively mandated special education program which required them to hold certificates to teach were held to be teaching staff members within the meaning of New Jersey's tenure law and entitled to acquire tenure.[222] A contention that the source of funds for the teaching positions was temporary was deemed irrelevant to a determination of status for tenure purposes.[223]

In a series of decisions by the Supreme Court of Ohio, teachers successfully sought continuing contract where they established that they met statutory requirements for length of service and certification. An anomalous feature of the court's ruling in each case related to the statutory requirement for certification. In resolving an ambiguity in the tenure statute, the court concluded that "qualified as to certification" did not require professional certification in the subject or course the employee was hired to teach.[224]

The applicability of teacher tenure laws to other professional employees was the subject of review in a number of appellate decisions. The Missouri Court of Appeals ruled that a school principal was ineligible for permanent status and not protected from nonrenewal by the state's teacher tenure provisions.[225] Under Alabama's law, an advisor could not invoke the due process protections of the teacher tenure law in contesting his transfer from that position.[226] Improperly suspended physical education instructors, protected by tenure in Illinois, could be restored to teaching positions, but not to coaching duties since coaching responsibilities were not protected by the tenure statute.[227]

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[219] Pottsville Area School Dist. v. Marteslo, 423 A.2d 1336 (Pa. Commw. Ct. 1980), where a teacher hired as a substitute was denied designation as a temporary professional employee and reinstatement to her position; and School Comm. of City of Providence v. Board of Regents for Educ., 429 A.2d 1297 (R.I. 1981), where substitute teacher's termination one day before he could attain statutory right to "regularly employed" status was held not to be improper.

[220] Corrigan v. Donilon, 433 A.2d 198 (R.I. 1981); Robins v. Blaney, 435 N.Y.S.2d 675 (N.Y. Sup. Ct. 1981); and Johnson v. Board of Educ. of Decatur, 423 N.E.2d 903 (Ill. 1981).

[221] Pottsville Area School Dist. v. Marteslo, 423 A.2d 1336 (Pa. Commw. Ct. 1980).

[222] Hamilton Twp. Supplemental Teachers' Ass'n v. Hamilton Twp. Bd. of Educ., 434 A.2d 1109 (N.J. Super. Ct. App. Div. 1981), and Spiewak v. Board of Educ. of Rutherford, 434 A.2d 1105 (N.J. Super. Ct. App. Div. 1981).

[223] *Id.*

[224] State *ex rel.* Voss v. Northwest Local Bd. of Educ., 421 N.E.2d 516 (Ohio 1981); Woodrum v. Rolling Hills Bd. of Educ., 421 N.E.2d 859 (Ohio 1981); State *ex rel.* Peet v. Westerville City School Dist., 421 N.E.2d 861 (Ohio 1981).

2.7b Tenure by Default or Acquiescence

A professional employee obtains tenure or continuing contract through compliance with statutory requirements. Statutory provisions may contain ambiguities, however, which lead to a need for judicial interpretation of the applicable requirements governing tenure. An illustrative case of this type focused on the meaning to be given Georgia's teacher tenure law in a dispute in which a board's decision not to renew a teacher led to a claim of denial of due process. The federal district court was asked to determine whether the teacher was tenured and thus entitled to due process protection. Georgia law provided for notice and a hearing for any teacher employed for more than three successive years or who had completed two years and, while in a third year of employment, received a notice of contract renewal for a fourth year. The district court ruled for the teacher, interpreting the statute to grant a property right where the teacher had completed thirty-six months of continuous service and noting that the employee should be given credit towards tenure for the first half year he was employed in the district.[228]

Judicial decisions relative to the interpretation of statutory notice requirements and expiration of the probationary period have influenced the award of tenure. A teacher was held to have acquired tenure by acquiescence upon the completion of her third year of consecutive service despite notification from the superintendent that she was not to be employed for a fourth year. In affirming the award of tenure, the Massachusetts appellate court recognized that the school board had not voted not to rehire the teacher, thus the superintendent's notification did not meet statutory requirements.[229] A superintendent's recommendation that a probationary principal receive tenure did not operate to modify the employment contract, creating tenure by acquiescence under New York statute. The court interpreted the tenure law to provide an additional 120 days of probation after the expiration date of the contract of employment and found the board had notified the principal of its decision not to renew within that period.[230]

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[225] Duncan v. Reorganized School Dist. No. R-1, 617 S.W.2d 571 (Mo. Ct. App. 1981).

[226] Smith v. Birmingham Bd. of Educ., 403 So. 2d 226 (Ala. 1981).

[227] School Directors of Dist. U-46 v. Kossoff, 419 N.E.2d 658 (Ill. App. Ct. 1981). *But see* Tate v. Livingston Parish School Bd., 391 So. 2d 1240 (La. Ct. App. 1980), where remand was necessary to determine whether a coach must be the holder of a teacher's certificate prior to determining whether a high school coach's position was protected by state tenure law.

[228] LaPier v. Holliman, 514 F. Supp. 692 (N.D. Ga. 1980).

2.8 CERTIFICATION

2.8a Certification Standards

Certification or licensure insures that the holder has met state requirements and is therefore qualified for employment in the specialization for which certification is granted. The state may prescribe standards for certification and procedures for granting status. Generally, courts will decline to intervene where certification is denied, while interpreting and enforcing the standards established for certification with rigid conformity to literal construction. A Michigan Department of Education rule requiring "at least one year of experience teaching handicapped people" was held to require that certification could be granted only where the teacher could document at least one year of teaching children in a self-contained, special education classroom.[231] Where state law required that only certified nurse-teachers could be employed by the school board, the Supreme Court of Rhode Island declined to permit the hiring of noncertified nurses for certain limited nursing duties.[232]

2.8b Revocation or Suspension

Revocation or suspension of the teaching certificate terminates the holder's right to teach and may be distinguished from dismissal by a local school board since loss of the certificate forecloses all teaching opportunities within the state. Evidentiary standards and conformity to due process are usually more rigorous where the loss of a teaching certificate is involved. Suspension of a teaching certificate was reversed by a Florida court where the charge was failure to make reasonable efforts to protect a student from conditions harmful to health and safety, but the state board made no finding that the teacher knowingly refused to comply with an explicit requirement to protect students.[233] Revocation of a teaching certificate was overturned in California when the only evidence of allegedly immoral or unprofessional conduct was unsworn hearsay statements of criminal conviction.[234]

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[229] Ester-Mary Farrington v. School Comm. of Cambridge, 415 N.E.2d 211 (Mass. 1981).

[230] Kight v. Wyandanch Union Free School Dist., 443 N.Y.S.2d 751 (N.Y. App. Div. 1981).

[231] Golonka v. State of Michigan, Dept. of Educ., 308 N.W.2d 425 (Mich. Ct. App. 1981).

[232] Cranston Teachers' Ass'n v. Cranston School Comm., 424 A.2d 648 (R.I. 1981).

2.9 DISABILITY AND RETIREMENT

Disability benefit plans under school district and state-mandated benefit programs were the subject of litigation in New York. A board of education retirement system's refusal to accept a school custodian-engineer's application for accidental disability retirement benefits was affirmed on the basis that the system's policy establishing a two-year period in which to file for benefits was a reasonable limitation.[235] In a second case, a determination that a particular incident did not constitute an on-the-job accident was upheld on the basis of substantial evidence. A school aide was denied accidental disability benefits because the onset of the disability resulted from physical exertion in the performance of her usual and customary work and, therefore, was not attributable to an accident within the meaning of the statute law.[236] In another New York case, a former police officer who received retirement benefits sought disability benefits from the state's teachers' retirement fund. The court effectively denied the disability award by holding that the retired policeman was statutorily prohibited from participating in teachers' retirement during his employment with a school district as a teacher.[237]

A former school employee who sought a pension under Indiana law was denied benefits because she was not considered to have been a contributing member of the retirement fund for the requisite ten-year period.[238] The employee had twenty-six years of service when her township school merged into a new school corporation in 1958. The new corporation extended employment benefits to the merged district's

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233. Jenkins v. State Bd. of Educ., 399 So. 2d 103 (Fla. Dist. Ct. App. 1981).

234. Carl S. v. Commission for Teacher Preparation and Licensing, 178 Cal. Rptr. 753 (Cal. Ct. App. 1981).

235. Warman v. Board of Educ. Retirement Sys., 435 N.Y.S.2d 611 (N.Y. Sup. Ct. 1981).

236. Atkins v. Regan, 444 N.Y.S.2d 253 (N.Y. App. Div. 1981).

237. Syrewicz v. New York State Teachers' Retirement Sys., 435 N.Y.S.2d 808 (N.Y. Sup. Ct. 1981).

238. Hartig v. Evansville-Vanderburg School Corp., 423 N.E.2d 680 (Ind. Ct. App. 1981).

employees, but the employees' retirement in 1966 fell two years short of the required period for participation.

A former school bus driver was held to be entitled to the reinstatement of retirement benefits after he quit his employment with a Louisiana school district. The employee had returned to work during a period in which he received retirement benefits for a previous employment period. The Louisiana Supreme Court granted reinstatement of benefits when the employee stopped working, but required the employee to offset benefits received from the school system during the time he was being paid for his employment.[239]

Mandatory retirement policies and incentive plans for early retirement have been proposed in many school districts as a means to ameliorate increasing personnel costs and to infuse the school system with new professional employees. The Supreme Court of Hawaii assessed the constitutionality of a mandatory, age sixty-five retirement policy relative to the equal protection and due process clauses of the state constitution. The court rejected the contention that age discrimination was a suspect classification requiring application of the compelling state interest test and ruled that the mandatory retirement policy adopted by the state board of education met the rational basis test.[240] The court found the state statute authorizing mandatory retirement to be constitutional, citing as the rational basis for the law a presumption that the rigors of modern day teaching place too much stress on a sixty-five-year-old teacher.[241]

In a decision by the Court of Appeals of Washington, the court compared a school district's mandatory retirement policy to cases involving nonrenewal for reasons of financial exigency or declining enrollment, holding that in these cases the decision not to renew is based on administrative reasons, unrelated to the teacher's performance or conduct.[242] Using this reasoning, the court concluded that the only issues which could be raised at a hearing on mandatory retirement related to the reasonableness of the district policy and whether the policy was being uniformly and properly applied.[243]

Massachusetts' law makes provision for the inclusion of an early retirement provision in board policy or negotiated agreements with employees. The principal issue which the implementation of these policies has generated appears to relate to the practice of including incentive payments to retirees as part of the "regular compensation" on which retirement allowances are calculated. These incentive payments for early retirement are not subject under Massachusetts' law to be included by the retirement board in the base on which retirement benefits are to be calculated.[244] The view of the Supreme Judicial Court of Massachusetts is that the payments are not subject to inclusion because they are severance payments which are not reasonably related to the particular performance of employees in the years in which the payments are attributed.[245]

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[239] Smith v. Board of Trustees of Louisiana School Employees' Retirement Sys., 398 So. 2d 1045 (La. 1981).

[240] Nagle v. Board of Educ., 629 P.2d 109 (Hawaii 1981).

[241] *Id.*

[242] Adams v. Clover Park School Dist., 629 P.2d 1336 (Wash. Ct. App. 1981).

[243] *Id.*

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[244] Massachusetts Teachers' Ass'n v. Teachers' Retirement Bd., 419 N.E.2d 282 (Mass. 1981).

[245] Boston Ass'n of School Administrators v. Boston Retirement Bd., 419 N.E.2d 277 (Mass. 1981).

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3

BARGAINING

Hugh D. Jascourt

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3.0 INTRODUCTION

After a decline in litigation, as reported in *The Yearbook of School Law 1981*, the number of bargaining cases shot back up during the past year. Once again the dominant area of controversy involved grievance arbitration. The second largest number of cases, although dwarfed by the first category, involved scope of bargaining. However, running throughout all the cases and perhaps prodding the increase in litigation were disputes concerning the results of decreased revenues and other efforts to cope with fiscal crisis.

The decisions reflect a remarkable concensus of opinion in the context of dissimilar statutory systems for labor relations and for education as well as varying political climates. Although there is less than a common law of labor relations in the public sector and each case should be read in the context of its statutory framework, there is considerable reference to cases decided by courts from states outside the forum before which the case is being decided. In addition, cases having significant influence—whether from within or outside the jurisdiction—frequently involve nonschool employers. However, because of the large number of education employees and the type of issues raised, much of the leading precedent affecting noneducation employees arises out of cases involving education employees.

Of the many cases discussed, six are capsulized below as likely to have the most impact beyond the limited fact situation which gave rise to the decisions and beyond the jurisdiction in which they were decided. The section in which each is discussed more fully is indicated in parentheses.

1. *Boston Teachers Union Local 66 v. City of Boston*[1] (3.7), holding that the mayor could neither refrain from submitting to city council a request for supplemental appropriations to fund executed collective bargaining agreements nor veto the council's subsequent appropriation, and that the setting of the city's tax rate can be stayed in the interim.
2. *Arrowhead United Teachers Organization v. Wisconsin Employment Relations Commission*[2] (3.3a(2)), concluding that student teachers are "employees" entitled to collective bargaining rights.
3. *Marshalltown Education Association v. Iowa PERB*[3] (3.5e), determining as nonnegotiable a proposal by a school employer that supervisory and administrative staff have certain seniority rights upon entry or reentry into the unit.
4. *Dodge City National Education Association v. Unified School District No. 443*[4] (3.5a), finding that a school board does not have the right to unilaterally change from a six-period day to a seven-period day.
5. *Perry Local Educators' Association v. Hohlt*[5] (3.1), ruling that access to the school's internal mail system must be provided to a union competing with the exclusive representative which does have such access.
6. *Hunterdon Central High School Board of Education v. Hunterdon Central High School Teachers Association*[6] (3.1), affirming that a negotiated provision allowing teachers to take a "religious leave day" violates the establishment clause of the First Amendment.

3.1 CONSTITUTIONAL ISSUES

Since the action of public sector management involves the exercise of governmental powers, challenges to the exercise of such powers sometimes are framed in constitutional terms rather than labor relations terms and, therefore, are decided on the basis of constitutional law.

One such challenge was made by a teachers union which desired to compete with an exclusive representative and claimed that the collective bargaining agreement between the parties unconstitutionally precluded competing unions from using an Indiana school's internal mail system. The Seventh Circuit Court rejected the holding of the

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[1] 416 N.E.2d 1363 (Mass. 1981).

[2] 1981-83 PBC ¶ 37,359 (Wis. Cir. Ct. 1981). *See* THE YEARBOOK OF SCHOOL LAW 1981 (P. Piele ed.) [hereinafter cited as Yearbook 1981] at 99.

[3] 299 N.W.2d 469 (Iowa 1981).

[4] 635 P.2d 1263 (Kan. Ct. App. 1981).

[5] 652 F.2d 1286 (7th Cir. 1981).

[6] 429 A.2d 354 (N.J. 1981). *See* YEARBOOK 1981 at 99.

Sixth Circuit[7] that an exclusive access policy was rationally related to the goal of preserving labor peace with the school system, explaining that, because discriminatory treatment of speech on the basis of its content or on the basis of the identity of the speaker usually requires rigorous scrutiny, there must be a compelling state interest for the limitation rather than for the limitation to be merely rationally related to a legitimate state interest. Finding there was no clear proof that the incumbent union's execution of its duties would be significantly impaired by such access and that claims of substantial disruption amounted to mere speculation, the circuit court held that disparate access to communication (as distinguished from other rights such as checkoff) could not be justified.[8]

The equal protection doctrine was used by educators to challenge their salary and employment benefits which were less than that paid to other similar teachers of the same employer. An Illinois appellate court rejected the claim on the basis that the plaintiffs' benefits were established through a collective bargaining agreement ratified by members of the bargaining unit.[9]

Although picketing is protected as an exercise of free speech, a Pennsylvania local court held that the right of privacy must be treated with as much deference and enjoined teachers from picketing at the home of school board members who were undertakers at whose homes funerals were conducted. The court characterized noisy picketing while a funeral was being conducted as a "bold, disrespectful intrusion upon a very private occasion."[10]

Constitutional grounds were also used to contest the invocation of strike penalties in New York. In one case, a United States District Court rejected contention that strikers were denied due process on the ground that the Chancellor of the New York City School System had a pecuniary interest in determining that they violated the law and that suspension of their tenure constituted a cruel and unusual punishment.[11] In two other cases, teachers' unions challenged the system under the New York state law as administered by the state public employment relations board (hereafter "PERB," but "PERC" is used when the body is a Commission instead of a Board), in which unions found to have sanctioned a strike, lose their dues checkoff rights. The unions asserted that the statutory system results in a denial of equal protection since teachers are not allowed to be under local PERBs, which have less frequently imposed checkoff forfeiture. They cited New York City as an example on the basis that the teachers union lost checkoff privileges three times while no union under the local public sector law suffered checkoff suspension even though such unions had engaged in eighteen strikes, six of which led to contempt proceedings. In both cases, the United States District Court held that since there is a rational basis for placing teachers under the state law and that since there is a legitimate state interest in allowing local governments to develop their own labor relation machinery, the differences in strike enforcement reflect local discretion and not a denial of equal protection.[12]

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[7] Memphis American Fed'n of Teachers, Local 2032 v. Board of Educ., 534 F.2d 699 (6th Cir. 1976).

[8] Perry Local Educators' Ass'n v. Hohlt, 652 F.2d 1286 (7th Cir. 1981).

[9] Aldridge v. Boys, 424 N.E.2d 886 (Ill. App. Ct. 1981).

[10] Chester-Upland School Dist. v. Chester-Upland Educ. Ass'n, 1981-83 PBC ¶ 37,370 (Pa. C.P. 1981).

[11] O'Brien v. Board of Educ. of City School Dist. of City of New York, 498 F. Supp. 1033 (S.D.N.Y. 1980).

The establishment clause of the First Amendment was used by the New Jersey Supreme Court as the basis for invalidating a negotiated provision for paid "religious days" although the court did indicate that it was constitutionally possible for public employers to otherwise accommodate the religious beliefs and practices of employees.[13]

3.2 AUTHORITY TO BARGAIN IN ABSENCE OF STATUTE

Illinois joined the states which statutorily allow a school employer to engage in collective bargaining with its employees. However, the new law does not set forth the scope of bargaining, is skeletal in form, and establishes no enforcement or administrative machinery other than to empower regional superintendents of schools to establish rules and regulations for the conduct of elections, and to decide questions concerning representation.[14]

Because Ohio does not have a law authorizing collective bargaining, an appellate court held that the courts cannot compel a school board and a teachers union to negotiate with each other or to submit to mediation. However, a school board cannot later object to court-compelled regulations which it, in essence, accepted in exchange for the court enjoining a strike by the teachers. Therefore, the court held it could require the school board to enter into the oral contract it reached with the union but later refused to sign and execute.[15]

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[12] Shanker v. Helsby, 515 F. Supp. 871 (S.D.N.Y. 1981); Buffalo Teachers Fed'n v. Helsby, 515 F. Supp. 215 (S.D.N.Y. 1981).

[13] Hunterdon Cent. High School Bd. of Educ. v. Hunterdon Cent. High School Teachers' Ass'n, 429 A.2d 354 (N.J. 1981) *aff'g* 416 A.2d 980 (N.J. Super. Ct. App. Div. 1980). *See* YEARBOOK 1981 at 99-100.

[14] ILL. ANN. STAT. ch. 122, §§ 3-14.24, 10-22.42, 10-22.40a (Smith-Hurd).

[15] Cleveland City School Dist. v. Cleveland Teachers Union, 427 N.E.2d 540 (Ohio Ct. App. 1980). *But see infra* note 143.

State laws do not necessarily confer upon all employees collective bargaining rights. Indiana is such a state in that it gives such rights only to teachers. In one case, nonteaching employees, such as bus drivers, custodians, cooks and maintenance workers, claimed that once a school board adopted a policy to negotiate with "classified employees" it could not precondition recognition by limiting the employees' choice of a representative. An appellate court held that since there was no legal obligation on the part of the school board to extend recognition, the school board had the freedom to choose the "agent" with whom it would deal.[16]

3.3 RECOGNITION OF UNIONS AND REPRESENTATION PROBLEMS

3.3a Unit Determination

3.3a(1) Supervisory, Managerial, and Confidential Employees

A Michigan court upheld findings by the Michigan Employment Relations Commission that the assistants to the regional superintendent of the Detroit School District, which is divded into eight regions, are "executives" and, therefore, excluded from the bargaining unit. In addition, there is a central board of education which is organized into various divisions. The directors of these divisions were also held to be executives.[17]

3.3a(2) Other Issues on Scope and Composition

One of the most significant PERB decisions reported last year was a decision of the Wisconsin Employment Relations Commission that intern teachers were "employees" within the meaning of the law and are entitled to recognition rights, even though they were placed in a unit that did not include the regular teachers.[18] Since that time the WERC decision was appealed and upheld by a lower court.[19] Similarly, the Supreme Court of Minnesota upheld a Minnesota PERB decision that substitute bus drivers were not members of the bargaining unit for bus drivers,[20] over a dissent that both have the same job responsibilities and job-related problems.[21]

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[16] Michigan City Area Schools v. Siddall, 427 N.E.2d 464 (Ind. Ct. App. 1981).

[17] Detroit Bd. of Educ. v. Local 28, Organization of School Administrators and Supervisors, 308 N.W.2d 247 (Mich. Ct. App. 1981).

[18] Arrowhead School Dist. 1, Decision No. 17213-B (WERC 1980). *See* YEARBOOK 1981 at 99, 103.

[19] Arrowhead United Teachers Organization v. WERC, 1981-83 PBC ¶ 37,359 (Wis. Cir. Ct. 1981).

[20] Patzwall v. PERB, 306 N.W.2d 118 (Minn. 1981).

[21] *Id.* at 122.

3.3b Elections and Recognition

Because the Maryland statute creates a duty to negotiate only with employee organizations designated by the county school board, a Maryland appellate court construed the law to not require a school board to designate an organization to represent noncertificated employees.[22] As also found in Indiana, the court held that the school board's recognition of an organization of certificated employees, while denying one of uncertificated employees, did not constitute a denial of equal protection.[23]

In Florida, a court overruled the state PERC and ordered that school bus drivers, who were not entitled to a unit of their own, be given a self-determination election to choose inclusion in an existing unit of school maintenance, custodial, and warehouse employees or to remain outside the unit and unrepresented. The PERC had wanted to include them without such an election.[24]

3.4 RIGHTS AND OBLIGATIONS OF EXCLUSIVE BARGAINING REPRESENTATIVES

3.4a Rights of the Union and Its Representatives

The basic element of exclusive representation is that the majority acts as the representative of all employees in the units. Consequently, a teacher, who did not want to participate in the negotiated group dental plan and was precluded from negotiating with the school district about it, was found by a Pennsylvania court to have not been deprived of his constitutional right to petition government and had no basis to preclude application of the plan to himself.[25] Consistent with such rights of exclusive representation, the Minnesota Supreme Court held that unless there was a contractual agreement permitting it, the school district was precluded from permitting a minority union check-off rights.[26]

Although substitute teachers were not within the unit of regular teachers and although the representative of the substitutes took the position that the names of substitute teachers should not be disclosed for fear of intimidation if they would be called upon as replacements in the event of a strike, an Oregon court found the teachers union nevertheless was entitled to a copy of the school district's roster of substitute teachers.[27]

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[22] Charles Cty. Supporting Servs. Employees Local Union 301 v. Board of Educ. of Charles Cty., 427 A.2d 1025 (Md. Ct. Spec. App. 1981).

[23] *Id.* at 1032-33. *See also supra* note 15.

[24] School Bd. of Polk Cty. v. Florida PERC, 399 So. 2d 520 (Fla. Dist. Ct. App. 1981).

[25] Pennsylvania Labor Rel. Bd. v. Eastern Lancaster Cty. Educ. Ass'n, 427 A.2d 305 (Pa. Commw. Ct. 1981).

[26] Anoka-Hennepin Educ. Ass'n v. Anoka-Hennepin Indep. School Dist. No. 11, 305 N.W.2d 326 (Minn. 1981).

3.4b Union Security

When the United States Supreme Court determined that agency shop provisions applicable to public employees were not unconstitutional,[28] litigation over union security in public sector did not cease. In Indiana an appellate court ruled that an agency shop agreement requiring discharge of teachers who failed to pay the required fee was invalid because the legislature has entrusted to school corporations as their sole province the decision to retain or dismiss teachers and they are prohibited from bargaining away that duty.[29] Similarly, an Illinois court[30] focused on the mandatory discharge provision and, applying the same reasoning to painters, explained that a union shop provision was invalid because "[i]t removes from the board, and therefore from public control, a significant element of discretion in selecting its maintenance personnel."[31] However, in Michigan compliance with the Teachers' Tenure Act did not prevent discharge of a teacher who did not meet her obligations under an agency shop agreement, since the state public employment relations act supercedes both the substantive and procedural requirements of other teachers' acts.[32] In Connecticut, the state supreme court held that because agency shop is not contrary to public policy, enforcement of a contractual provision is valid even though the provision preceded the state law legally authorizing agency shop. The court further upheld enforceability after the enactment of the state law as to teachers whose individual contracts preceded the state law.[33]

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[27] Morrison v. School Dist. No. 48, Washington Cty., 631 P.2d 734 (Or. Ct. App. 1981).

[28] Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977). *See* THE YEARBOOK OF SCHOOL LAW 1978 (P. Piele ed.) at 143, 144, 155.

[29] Anderson Fed'n of Teachers, Local 519 v. Alexander, 416 N.E.2d 1327 (Ind. Ct. App. 1981).

[30] Board of Educ. of School Dist. No. 189 v. Cahokia Dist. Council No. 58, 417 N.E.2d 151 (Ill. App. Ct. 1981).

[31] *Id.* at 153.

[32] White Cloud Educ. Ass'n v. Board of Educ. of White Cloud Pub. Schools, 300 N.W.2d 551 (Mich. Ct. App. 1981), *relying on* Detroit Bd. of Educ. v. Parks, 296 N.W.2d 815 (Mich. Ct. App. 1980). *See* YEARBOOK 1981 at 106.

[33] Dowaliby v. Hartford Fed'n of Teachers, Local 1018, 424 A.2d 950 (Conn. 1980).

In California the teachers union, instead of seeking discharge of those who did not pay their agency shop fees, went to small claims court to obtain the required fee. An appellate court overturned the judgments obtained on the basis that the state law authorizing discharge for nonpayment does not authorize the negotiation of other remedies, including civil suit, for nonpayment.[34]

Another source of litigation has been over the amount of the agency shop fee to be paid. In one case, teachers contended that the fee was excessive because it included payment to the local union's state and national parent bodies. A California court held that such an inquiry must first be submitted to the state PERB.[35] The most extensive response to a challenge to the amount of fees was made by the Wisconsin Employment Relations Commission. Attempting to balance the alleged infringement on constitutional rights against the needs to make the system of exclusive representation meaningful, the WERC found as permissible uses of the following fees paid by employees (to the extent uses did not relate primarily to representation purposes the amount of the fee would have to be reduced): (1) union organizing efforts, including efforts in school districts outside the one in which plaintiffs were employed, since the maintenance of a secure status enhances the union's ability to deal effectively with the employer; (2) lobbying for legislation since lobbying activities are an integral part of the public employee collective bargaining process and such lobbying effects the benefit levels of other employers used as comparison points; (3) affiliation fees to other labor organizations not involved in the negotiation of their contracts, since affiliation enhances the representational potential; (4) union membership meetings and conventions to the extent such activities are not for ideological purposes; (5) impasse expenses including those for strikes that are not illegal; and (6) social and recreational activities and payments for various types of insurance, since they are part of the representational interest. The WERC held fees could not be used to support political organizations and candidates or even "get out the vote" campaigns, since employees should be free to choose their own ideological and charitable causes.[36]

3.4c Obligations of the Exclusive Representative

Although an employee challenging a vote to ratify a collective bargaining agreement was aware of the election and did vote, she had standing to assert that nonunion members did not receive adequate prior notice of the vote and of their eligibility to vote. Since such notice did go to union members, the election outcome could have been significantly affected. Therefore a Florida appellate court affirmed a PERC order to conduct a new ratification election.[37] However, a Pennsylvania court upheld a ratification election in which nonunion members were not allowed to vote, but were notified and invited to come to the meeting and were invited to ask questions and to express their opinions, since there was no evidence the contract ratified disregarded the "interests of their nonunion fellows."[38]

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[34] San Lorenzo Educ. Ass'n v. Wilson, 179 Cal. Rptr. 25 (Cal. Ct. App. 1981).

[35] Leek v. Washington Unified School Dist., 177 Cal. Rptr. 196 (Cal. Ct. App. 1981).

[36] Browne v. Milwaukee Bd. of School Directors, Wisconsin Employment Relations Comm'n Dec. No. 18408 (1981).

A Maryland court invalidated a union change in affilitation on the basis that there was inadequate notice of a vote to change the bylaws setting forth the requirements for a membership vote on such a shift in affiliation and since the affiliation switch was voted under the new procedures.[39]

3.5 SCOPE OF BARGAINING

3.5a Duty to Bargain

Even if a union does not propose to negotiate on an item, a school board cannot unilaterally change working conditions after negotiations have been concluded. At least, that is what a Kansas court held with regard to changing a six-period class day to a seven-period day, since otherwise a union would have to indicate its desire to negotiate on terms which it does not desire to change, and which would burden and prolong the negotiation process.[40] According to a California court the union has to waive its right through "clear and unmistakable language," although a change without impact would not breach the employer's duty to the union. In the case before the court, a change in the administrators of the school district's health plan would not have been such a breach had not the insurance benefits also been affected by the identity of the administrators.[41]

Sometimes the issue is over what has been changed. Generally, labor relations law views "past practice" as the reference point. Consequently, although a school board had a formally adopted policy of requiring all personnel to take physical examinations, with the option of using their own personal physicians if done at their own expense, the school board was precluded by a New York court from unilaterally implementing that policy since during the life of the policy the school board previously had reimbursed employees who were examined by their own doctors.[42]

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[37] International Brotherhood of Painters v. Anderson, 401 So. 2d 824 (Fla. Dist. Ct. App. 1981).

[38] Pennsylvania Labor Relations Bd. v. Eastern Lancaster Cty. Educ. Ass'n, 427 A.2d 305 (Pa. Commw. Ct. 1981), *aff'g* 104 LRRM 2550 (Pa. C.P. 1980). *See* YEARBOOK 1981 at 107.

[39] American Fed'n of Teachers v. Lubman, 435 A.2d 801 (Md. Ct. Spec. App. 1981).

[40] Dodge City Nat'l Educ. Ass'n v. Unified School Dist. No. 443, 635 P.2d 1263 (Kan. Ct. App. 1981).

[41] Oakland Unified School Dist. v. PERB, 175 Cal. Rptr. 105 (Cal. Ct. App. 1981).

A New Jersey court held that not all changes trigger an obligation to negotiate, such as where a board of education eliminated two modules per day of seventh grade language instruction and substituted therefor one module of reading and one of math without lengthening the school day.[43] The court explained, "without some measure of flexibility constant battles would be waged over every change in format, with each change viewed as an opportunity to extract more concessions."[44] The court went on to say:

> A change from preexisting practice which is directly related to an educational purpose should not be measured by caliper and micrometer. Boards of education must be given some room to manage between contracts without being forced to bargain over every move they make. There must be some rounding of the edges of contention. The business of providing education is not an assembly line operation with productivity measured in discrete product units for which an exact exchange of compensation can be given.[45]

A New York court held that the duty to refrain from making a change without first dealing with the exclusive representative does not extend to subjects which are not mandatory subjects of bargaining. In the instant case, the length of individual contracts of employment was not mandatorily negotiable and, therefore, the employees were not deprived of any rights by the school board's actions.[46] Similarly, the Connecticut State Board of Labor Relations held that a school board did not violate its duty to the union when it unilaterally imposed a ban on smoking by adults and students within school buildings, thereby abolishing the designated areas in the building where teachers previously could smoke. The state board characterized the ban as an educational policy decision within the board's managerial prerogatives not subject to negotiations, since the policy controlled the behavior of all persons entering school property and not just teachers alone, and involved the management of school property in the same manner as a ban on alcoholic beverages. The state board added that the union's argument—that the policy would not effectively discourage student smoking—was not relevant since the school board's bargaining obligation is not affected by whether the school's policy is likely to successfully achieve its purpose.[47]

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[42] Board of Coop. Educ. Servs. Sole Supervisory Dist., Onondaga and Madison Counties v. New York PERB, 444 N.Y.S.2d 226 (N.Y. App. Div. 1981).

[43] Caldwell-West Caldwell Educ. Ass'n v. Caldwell-West Caldwell Bd. of Educ., 435 A.2d 562 (N.J. Super. Ct. App. Div. 1981).

[44] *Id.* at 566.

[45] *Id.* at 567.

[46] Spencerport Transp. Ass'n v. New York PERB, 436 N.Y.S.2d 43 (N.Y. App. Div. 1981).

The union equally has a duty to bargain and the Washington PERC held that a union improperly delayed negotiation when it refused to meet to accommodate the vacation plans of its chief spokesman.[48]

3.5b Interrelationship with Other Laws

Since a public employee relations law is not the only statute affecting terms and conditions of employment by public employees, questions sometimes arise whether a bargaining proposal or even a negotiated provision conflicts with and is barred by another statute. Thus, in Massachusetts a statutory ban on payments of salary in excess of workmen's compensation benefits prevailed over a provision in the collective bargaining agreement authorizing such payments.[49]

No conflict was found by a Colorado court with respect to a negotiated provision requiring school teachers on military leave for participation in reserve duties to turn over to the school board payments received from the military for that service, notwithstanding a state statute granting military leave, since the teachers nevertheless received full pay from the school during that period.[50] In New Jersey a state statute requiring a minimum of ten paid sick leave days in any school year did not invalidate a provision in a collective bargaining agreement allowing a proportionate amount of sick leave for those employed less than a full school year.[51] New Jersey's sick leave statutes, according to the New Jersey PERC, also did not preclude a contractual provision to pay, during child rearing leave, deferred compensation, pegged to accumulated sick leave benefits, even if the employee was able to work.[52]

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[47] Portland Bd. of Educ. v. Education Ass'n of Portland, Connecticut State Bd. of Labor Relations Decision No. 2001 (1981).

[48] Highline School Dist. No. 401 v. Highline Educ. Ass'n, Washington PERC Decision 1054-A EDUC (1981).

[49] School Comm. of Marshfield v. Marshfield Teachers Ass'n, 420 N.E.2d 318 (Mass. 1981).

[50] Colorado Springs Teachers Ass'n v. School Dist. No. 11, 622 P.2d 602 (Colo. Ct. App. 1980).

[51] Schwartz v. Dover Pub. Schools in Morris Cty., 434 A.2d 645 (N.J. Super. Ct. App. Div. 1981).

A New Jersey court ruled that regulations of the state board of education requiring local boards of education to adopt policies and procedures for evaluation of tenured teachers preempted collective bargaining over teacher evaluation, except to the extent that union proposals did not interfere with the local board's managerial responsibility to evaluate teachers' qualifications. Using this test the court found nonnegotiable proposals that teachers be evaluated only by persons certificated by the state board of examiners to supervise instruction and on the frequency of evaluation. The court, however, found negotiable a proposal requiring that teachers be notified by a specified date of the identity of the individual who would evaluate them and a proposal that visitations and observations not occur on the same day and that no observations should occur within ten days of a previous evaluation.[53]

3.5c Proposals within Mandatory Scope of Bargaining

Questions over the negotiability of subjects arise within many different contexts, such as whether the employer has unilaterally changed working conditions, whether refusal to negotiate over a proposal is an unfair labor practice, or in enforcement of contractual provisions through either unfair labor practices or arbitration procedures. Therefore, since the issue of negotiability or non-negotiability is so intertwined with other issues, this subsection and the two following subsections are not the only places in this chapter in which negotiability is identified or discussed. Moreover, most such decisions are decided by state PERBs and not by the courts and only the most significant or novel PERB decisions are cited in this chapter. In any event, the number of cases on negotiability in this chapter does not reflect the great frequency with which this issue is litigated.

In Oregon, proposals on terms and conditions of employment which have a greater effect or impact on educational policy than on employment conditions are not mandatorily negotiable. The Oregon Supreme Court applying this test viewed standards for evaluating teachers to not be mandatorily negotiable, but a proposal that "[c]riteria for the evaluation of all teachers shall be clearly defined" was negotiable, since it did not interfere with management's right to establish the criteria. What was important to the court was the ability of a teacher to object to an evaluation as being incomplete or unjust was dependent upon the ability of a teacher to ascertain and understand the criteria used to evaluate him or her.[54]

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[52] Hackensack Bd. of Educ. and Hackensack Educ. Ass'n, New Jersey PERC No. 81-138 (1981).

[53] Bethlehem Twp. Bd. of Educ. v. Bethlehem Twp. Educ. Ass'n, 427 A.2d 80 (N.J. Super. Ct. App. Div. 1981).

In another Oregon case, a school board argued that it has statutory duty to fix the hours of instruction and, therefore, it alone has the right to set the length of the school day. However, the court agreed with the union that the school board was obligated to negotiate over the length of time a teacher is required to spend with students during the instructional day, commonly referred to as student contact time.[55]

The right of school management to subcontract out work, according to the Maine Supreme Court, did not take out of the mandatory scope of bargaining a union proposal that such subcontracting "shall not cause the discharge or layoff of any member of the bargaining unit."[56] A Michigan court held that not only are health insurance benefits a mandatory subject of bargaining but so is the identity of the carrier, since the rate or benefits in future years could be affected by the carrier and since the choice "is not fundamental to the basic direction of the board's enterprise."[57]

3.5d Proposals within Permissive Scope of Bargaining

Since most decisions on negotiability result in a finding that a subject is within or is outside the scope of bargaining, usually there are not too many decisions on the "permissive" area, particularly before the courts. Generally, a permissive subject is one which a party is not obligated to negotiate but may negotiate, unlike the prohibited area which is precluded altogether. Therefore, if a permissive subject is negotiated it is enforceable unlike a prohibited subject which is unenforceable if it finds its way into a contract. In most states, a permissive subject negotiated in a contract can be removed from the bargaining table when a later contract is negotiated.

The only case this past year which resulted clearly in a finding of a permissive subject was an Oregon Supreme Court decision that a proposal which attempts to define the contents of what should be in an employee's personnel file falls within the permissive area. This was because of the "heavy effect" the location of certain records has on the organization and administration of districtwide records on accounting policies, although proposals on teacher access to and right to inspect such files was held to be within the mandatory scope of bargaining.[58]

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[54] Springfield Educ. Ass'n v. Springfield School Dist. No. 19, 621 P.2d 547 (Or. 1980).

[55] Gresham Grade Teachers Ass'n v. Gresham Grade School Dist. No. 4, 630 P.2d 1304 (Or. Ct. App. 1981).

[56] Superintending School Comm. of City of Bangor v. Bangor Educ. Ass'n, 433 A.2d 383 (Me. 1981).

[57] Houghton Lake Educ. Ass'n v. Houghton Lake Commun. Schools Bd. of Educ., 310 N.W.2d 888, 891 (Mich. Ct. App. 1981).

3.5e Proposals within Prohibited Scope of Bargaining

Despite what may appear to be the case to those not intimately involved with negotiations, management also makes proposals at the bargaining table and sometimes negotiability disputes arise with respect to such proposals. The following proposal by a school district was held by the Iowa Supreme Court to be outside the union's obligation to bargain:

> Administrators who are in positions not covered by the bargaining unit shall, in the event of a layoff or reduction in force at the administrative level, nevertheless retain bargaining unit seniority in their major teaching area which can be used by them if they are reassigned by the Board to the bargaining unit.

The court reasoned that since the proposal deals with the rights of those who are not unit members and some who may never have been unit members and since the law precludes the union from negotiating on behalf of those excluded from the unit, the employer cannot compel negotiations on benefits to such employees.[59]

On the basis that management necessarily must retain the prerogative of determining which teacher is best qualified to undertake tasks which affect student development, a New Jersey court held that it did not have to negotiate with the union over who should be the advisor to the junior class and the yearbook when there were no volunteers for those positions and the teachers assigned to perform those roles objected to them.[60] A New Jersey court also held that management had the prerogative, not subject to negotiations, to reduce to two weeks the summer employment of the cooperative industrial educational coordinator, particularly since only three students enrolled for the summer.[61] Similarly, the Minnesota Supreme Court held that the school board did not have to negotiate with the representative of supervisory personnel, although the board changed the duties of seven employees to the extent that they no longer were supervisors and, therefore, were out of the unit. The court ruled that the school employer had to retain the prerogative to consolidate administrative responsibility in fewer personnel so that a greater proportion of its resources could be devoted to classroom instruction.[62] These decisions appear to indicate a greater responsiveness by the courts to management rights needed to cope with sharply declining enrollment and reduced budgets, which was specifically noted as a key fact in the Minnesota case.

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[58] Springfield Educ. Ass'n v. Springfield School Dist. No. 19, 621 P.2d 547 (Or. 1980).

[59] Marshalltown Educ. Ass'n v. Iowa PERB, 299 N.W.2d 469 (Iowa 1980).

[60] Mainland Regional Teachers Ass'n v. Board of Educ. of Mainland Regional School Dist., 423 A.2d 998 (N.J. Super. Ct. App. Div. 1980).

[61] Caldwell-West Caldwell Educ. Ass'n v. Caldwell-West Caldwell Bd. of Educ., 435 A.2d 562 (N.J. Super. Ct. App. Div. 1981).

Similar to the Connecticut case in Section 3.5a,[63] a Pennsylvania court held that a ban on smoking in school buildings, although a term and condition of employment, was outside the obligation to bargain since it involved an educational policy which outweighed the interests of employees. The court cited as an example of educational policy the promotion of respect for authority fostered by the application of the ban and not just to students.[64]

Public policy is also a factor in determining negotiability, as illustrated by the decision of a Michigan court holding as void a provision in a collective bargaining agreement forbidding use of sick leave during maternity leave.[65]

3.5f Terms of Collective Bargaining Agreements

One of the growing areas of controversy arising out of declining enrollments and fiscal crisis is the retention status of administrative and supervisory staff. As an example, when a Delaware school district gave notice to 109 administrators that their contracts would not be renewed they were told that their seniority status would be based on service within the school district in both teaching and administrative capacities. The teachers' union attempted to block the reassignment of administrators into teaching positions based on such seniority, but a Delaware court held that the collective bargaining agreement was not violated.[66] The terms of the collective bargaining agreement were also pivotal in a court action of a teacher contesting his discharge, since he claimed that the notice and the type of discipline did not meet the contractual requirements. His argument failed to convince a Washington appellate court.[67] Similarly, a school paraprofessional attempted to obtain unemployment benefits on the basis that the "summer pay" he received was not paid vacation benefits but deferred compensation under the collective bargaining agreement, but he failed to convince a New York court.[68]

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[62] Minneapolis Ass'n of Adm'rs & Consultants v. Minneapolis Special School Dist. No. 1, 311 N.W.2d 474 (Minn. 1981).

[63] *See supra* note 47.

[64] Chambersburg Area School Dist. v. Pennsylvania Labor Rel. Bd., 430 A.2d 740 (Pa. Commw. Ct. 1981).

[65] Nickels v. Brown City Commun. Schools, 307 N.W.2d 707 (Mich. Ct. App. 1981).

[66] New Castle Cty. Educ. Ass'n v. Board of Educ. of New Castle Cty. School Dist., 428 A.2d 1165 (Del. Ch. 1980).

[67] Pryse v. Yakima School Dist., 632 P.2d 60 (Wash. Ct. App. 1981).

3.6 GRIEVANCES

3.6a Grievability and Arbitrability

3.6a(1) Presumption of Arbitrability

Although far more litigation during the past year (as has been the case for the past several years) has involved grievance arbitration, and particularly challenges to arbitrability, than any other subject area of labor relations, the courts have continued to strongly adhere to a strong presumption of arbitrability. The attitude of the judiciary is best summed up by the response of a Washington appellate court to a claim that the initital steps of the negotiated procedure were not properly followed: "we must resolve all doubts in favor of arbitrability" and the court declined to rule on the school district's contention that a grievance over a reduction of employee working hours was within management's rights.[69] A series of New York cases demonstrates the breadth of the presumption. In one case arbitrability was upheld where the parties' agreement to arbitrate was clear and unequivocal although there the coverage of the applicable substantive provision of the contract was ambiguous.[70] Arbitrability was upheld even when the union failed to strictly comply with the statutory method of serving its demand for arbitration since the school board had actual notice and was not prejudiced.[71] Even where the substantive merits of the claim were weak, arbitrability was upheld since the "substance of the dispute in issue" was within the scope of the arbitration cause.[72] And where a union failed to answer a petition to stay arbitration, arbitrability was upheld on the basis that the arbitration clause in the agreement was unambiguous and encompassed the grievance at issue.[73]

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[68] Cohen v. New York City Bd. of Educ., 442 N.Y.S.2d 770 (N.Y. 1981).

[69] Shoreline School Dist. No. 412 v. Shoreline Ass'n of Educ. Office Employees, 631 P.2d 996, 998 (Wash. Ct. App. 1981).

[70] Hewlett-Woodmere Union Free School Dist. v. Hewlett-Woodmere Faculty Ass'n, 435 N.Y.S.2d 354 (N.Y. App. Div. 1981). *See also* Portland Ass'n of Teachers v. Portland School Dist. No. 1, Multnomah Cty., 625 P.2d 1336 (Or. Ct. App. 1981) in which the court said "the presence of ambiguous language in a contract . . . is precisely the situation in which the question of arbitrability is one to be decided by the arbitrator."

[71] Board of Educ. of Palmyra-Macedon Cent. School Dist. v. Palmyra-Macedon Faculty Ass'n, 433 N.Y.S.2d 643 (N.Y. App. Div. 1980).

[72] Franklin Cent. School v. Franklin Teachers Ass'n, 434 N.Y.S.2d 185, 414 N.E.2d 685 (N.Y. 1980).

3.6a(2) Who Determines

In the only case reaching a court this year, an Illinois appellate court stated unequivocally that an arbitrator, and not the court, should make the initial determination of arbitrability.[74]

3.6a(3) Remedy as a Factor in Arbitrability

Consistent with the presumption in favor of arbitrability, courts have not been receptive to the contention that arbitration should be stayed because the arbitrator would have to provide a remedy contrary to law if he found for the grievant. A Florida court characterized this argument as "[s]eeking to stay the proceeding below before arbitration, appellee cries 'ouch' before being hurt." The court stated that if an unlawful decision were made with respect to the priority of currently employed teachers seeking intersystem transfer to vacant positions, "then the school board could seek court actions."[75] Similarly, a New York court held, with respect to career increments which were denied, that it will not assume that the remedy granted will be an impermissible one.[76]

3.6a(4) Procedural Issues

Despite the heavy presumption in favor of arbitrability, New York courts have denied arbitrability where "the lack of specificity in the wording of the grievance makes it impossible to determine intelligently whether or not the grievance relates" to the contractual provision claimed to be the basis for arbitrability.[77]

Another basis on which to deny arbitrability is if the grievant has elected a different appellate route. However, a New York court held that a sex discrimination complaint filed with the division of human rights did constitute such an election of remedies, particularly where the separate proceedings do not involve the same grounds for relief and do not raise the possibility of inconsistent determinations.[78] Similarly, a Pennsylvania court held a teacher was not barred from contesting, under the just cause provision in a collective bargaining agreement, that he was demoted from a program coordinator to a classroom teacher by virtue of his participation in a hearing on whether declining enrollment and budgetary problems should result in the elimination of the program he was coordinating (and which ultimately caused his demotion).[79]

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[73] Board of Educ. of Rushford Cent. School v. Civil Serv. Employees Ass'n, 433 N.Y.S.2d 916 (N.Y. App. Div. 1980).

[74] Board of Educ., Commun. Consol. School Dist. 62, Cook Cty. v. Illinois Educ. Ass'n, 427 N.E.2d 789 (Ill. App. Ct. 1981).

[75] Manatee Educ. Ass'n v. School Bd. of Manatee Cty., 400 So. 2d 185 (Fla. Dist. Ct. App. 1981).

[76] Myack Bd. of Educ. v. Myack Teachers Ass'n, 443 N.Y.S.2d 425 (N.Y. App. Div. 1981). *See also* Wappingers Cent. School Dist. v. Wappingers Congress of Teachers, 443 N.Y.S.2d 429 (N.Y. App. Div. 1981) where a grievance over a change in job duties did not preclude arbitration.

[77] Enlarged City School Dist. of Troy v. Troy Teachers Ass'n, 434 N.Y.S.2d 761 (N.Y. App. Div. 1980) and Board of Educ. of Palmyra-Macedon Cent. School Dist. v. Palmyra-Macedon Faculty Ass'n, 433 N.Y.S.2d 643 (N.Y. Civ. Ct. 1980). *Cf.* Board of Educ., Yonkers City School Dist. v. Yonkers Fed'n of Teachers, 437 N.Y.S.2d 442 (N.Y. App. Div. 1981) (where the court found the notice to arbitrate was sufficient).

Another procedural bar is that only the union can proceed to arbitration, unless the union failed to meet its duty of fair representation, as held in two New York decisions.[80] A union also can waive binding arbitration,[81] but a stipulation by the parties to the arbitrator by itself can elevate an otherwise advisory proceeding to a binding one.[82] However, a grievant cannot assert the binding nature of such a stipulation when the first time the assertion is made is on appeal from a lower court ruling.[83]

In other cases, a New York court held that disputes which arise after the agreement has expired are not subject to arbitration unless the successor agreement (or the expired agreement) provided for extension of such rights,[84] but the New York Court of Appeals held arbitrable a dispute whether a provision in the "old" agreement allowed grievances during the hiatus period.[85] The Maine Supreme Court held that arbitrability cannot be decided as a declaratory judgment action.[86]

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[78] Williamson Cent. School Dist. v. Williamson Faculty Ass'n, 437 N.Y.S.2d 144 (N.Y. App. Div. 1981). *See also* Board of Educ. of Three Village Cent. Schools v. Three Village Teachers Ass'n, 440 N.Y.S.2d 47 (N.Y. App. Div. 1981) in which the education law dealt with the power to assign the grievant to a position as a permanent substitute as opposed to whether the assignment violated the agreement.

[79] West Middlesex Area School Dist. v. Pennsylvania Labor Rel. Bd., 423 A.2d 781 (Pa. Commw. Ct. 1980).

[80] Hoffman v. Board of Educ. of City School Dist. of City of New York, 444 N.Y.S.2d 1980 (N.Y. App. Div. 1981) and Berlyn v. Board of Educ. of East Meadow Union Free School Dist., 435 N.Y.S.2d 793 (N.Y. App. Div. 1981).

[81] Berlyn v. Board of Educ. of East Meadow Union Free School Dist., 435 N.Y.S.2d 793 (N.Y. App. Div. 1981).

[82] Hempstead Classroom Teachers Ass'n v. Board of Educ., Hempstead Union Free School Dist., 434 N.Y.S.2d 259 (N.Y. App. Div. 1980).

[83] Board of Educ. of Westbury Union Free School Dist. v. Ambach, 438 N.Y.S.2d 637 (N.Y. App. Div. 1981).

[84] Delaware Valley Cent. School Dist. v. Delaware Valley Faculty Ass'n, 435 N.Y.S.2d 141 (N.Y. App. Div. 1980).

[85] Windsor Cent. School Dist. v. Windsor Teachrs Ass'n, 436 N.Y.S.2d 267, 417 N.E.2d 761 (N.Y. 1980), *aff'g* 426 N.Y.S.2d 874. *See* YEARBOOK 1981 at 117.

[86] Cape Elizabeth School Bd. v. Cape Elizabeth Teachers Ass'n, 435 A.2d 1381 (Me. 1981).

3.6a(5) Management Prerogatives as a Bar

The scope of bargaining (discussed under 3.5) is equally determined by decisions on arbitrability or grievability since a provision in a contract dealing with a prohibited subject cannot be enforced and, therefore, is not subject to arbitration. Consequently, the Maine Supreme Court held that an arbitrator could not enforce a collective bargaining agreement requirement which would have precluded the school board from hiring a teacher from outside the school system when a teacher from within the school system had applied for the same position. The court did not view the preference provision as merely establishing criteria for hiring teachers. Instead, the school board was statutorily mandated to attempt to select the best possible teachers, according to the court, therefore, an agreement whereby the school board "agrees to prefer potentially less qualified teachers within the system" conflicts with that purpose.[87]

Similarly, the Alaska Supreme Court looked behind a provision allowing grievances over allegations of "a violation, misinterpretation or misapplication" of the agreement and a contractual provision stating nonprofessional duties should be equitably distributed. On the basis of these provisions a librarian sought arbitration claiming that she alone of fifty-two staff members should not have been the one to supervise drivers education students when their cars did not arrive on time. The court held that since the union was precluded from negotiating on relief from nonprofessional chores it could not obtain the same result through this back door approach.[88] However, the Oregon Court of Appeals ruled that a grievance over a policy, rule or regulation is arbitrable since the finding of a violation in no way affects the substance of that policy, rule or regulation.[89]

The New York Court of Appeals found that the provisions of the state education law setting forth substantive rules regarding layoff and recall do not manifest such a strong policy that precludes arbitration of a grievance by a teacher who claimed he should have been recalled from layoff on the basis of seniority.[90]

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[87] Board of School Directors of Maine School Admin. Dist. No. 36 v. Maine School Admin. Dist. No. 36 Teachers Ass'n, 428 A.2d 419 (Me. 1981).

[88] Kenai Peninsula Educ. Ass'n v. Kenai Peninsula Borough School Dist., 628 P.2d 568 (Alaska 1981).

[89] Eugene Educ. Ass'n v. Eugene School Dist. No. 4J, 623 P.2d 657 (Or. App. Ct. 1981). Technically, this decision was over the negotiability of a provision defining grievances to be over such violations and did not involve an attempt to enforce the contract.

[90] Board of Educ. of City of New York v. Glaubman, 439 N.Y.S.2d 907, 422 N.E.2d 567 (N.Y. 1981).

Similarly, another New York court held that the education law providing that the superintendent of schools shall possess the power to transfer teachers from one grade of course of study to another grade in that course did not preclude arbitration over a violation of a contractual provision that teaching assignments would not be changed except where necessary for effective management.[91] The New York Court of Appeals also held arbitrable grievances over the abolition of positions of director of music, director of guidance, director of nurses and others[92] and over an alleged failure to follow negotiated procedures for filling vacancies.

An increase in student contact time was held by the Minnesota Supreme Court to be arbitrable since it not only reduced the number of periods a teacher had for class preparation but also because the effect would be to make teachers work longer hours at the same salary.[94] An increase in workload, although caused by a change in educational policy, similarly was held arbitrable by the New Jersey PERC.[95]

Although in contrast to the above decisions, a Massachusetts court held that a grievance over the reduction of an art teacher's teaching responsibilities was not arbitrable since the power to partially eliminate a position is within management's prerogatives over educational policy, but the reduction of his salary was held to be arbitrable.[96] Other Massachusetts courts also denied management rights as a defense to arbitration over discipline of a teacher[97] or over promotion of a teacher.[98] In addition, a New York court held arbitrable a school board's adoption of a resolution that, contrary to past practice, it would no longer pay any portion of health insurance for retired employees.[99]

A New Jersey court did deny arbitration of a grievance by a librarian-media specialist that she should not have been terminated for her absences for which she claimed she had been improperly denied leave. The court stated that the arbitrator would have had to have interpreted the school board's policy which is a matter of managerial and administrative discretion reserved to the school board.[100]

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[91] Board of Educ. of City School Dist. of City of Poughkeepsie v. Poughkeepsie Pub. School Teachers Ass'n, 436 N.Y.S.2d 50 (N.Y. App. Div. 1981).

[92] Board of Educ., West Babylon Union Free School Dist. v. West Babylon Teachers Ass'n, 438 N.Y.S.2d 291 (N.Y. 1981).

[93] Board of Educ., Lakeland Cent. School Dist. of Shrub Oak v. Barni, 434 N.Y.S.2d 975, 415 N.E.2d 963 (N.Y. 1980).

[94] Minnesota Fed'n of Teachers Local 331 v. Independent School Dist. No. 361, 310 N.W.2d 482 (Minn. 1981). *Cf. supra* note 55 (student contact time arbitrable).

[95] Hoboken Bd. of Educ. and Hoboken Teachers Ass'n, New Jersey PERC No. 81-143 (1981).

[96] School Comm. of Lynnfield v. Trachtman, 417 N.E.2d 459 (Mass. App. Ct. 1981).

[97] Blackstone-Millville Regional School Dist. v. Mahoney, 421 N.E.2d (Mass. App. Ct. 1981).

[98] Blue Hills Regional Dist. School Comm. v. Flight, 421 N.E.2d 755 (Mass. 1981).

[99] Corinth Cent. School Dist. v. Corinth Teachers Ass'n, 434 N.Y.S.2d 725 (N.Y. App. Div. 1981).

3.6a(6) Tenure Issues

A school board's statutorily established duty to make tenure decisions is frequently asserted as a bar to arbitrability of a grievance over a denial of tenure. During the past year seven such cases arose, but in no case did that defense prevail. However, see Section 3.6b(3) with respect to the remedial power of an arbitrator.

The reason the defense did not persuade an Oregon court was that the arbitrator was asked only to examine the process of evaluating the teacher's performance. He was not asked to decide whether the teacher had performed satisfactorily.[101] New York courts also have upheld arbitrability when the grievance focused on whether the school board followed negotiated procedures for evaluating probationary teachers for the purpose of making tenure determinations.[102] The New York Court of Appeals also held that although a board of education may not bargain away its authority to grant or deny tenure, it may limit its right to terminate a probationary teacher during the probationary period.[103] In still another New York case a collective bargaining agreement which applied to substance rather than procedure did not contravene public policy because the discretion limited was that of the district superintendent and not that of the board of education.[104] A Michigan court, however, held that a school board can agree to limit its right to not renew a teacher, although it did find in the case before it that the school board through the collective bargaining agreement retained its right.[105]

3.6a(7) General

For a dispute to be excluded from a negotiated grievance procedure, an Illinois court held the matter had to be specifically excluded.

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[100] Demarest Bd. of Educ. v. Demarest Educ. Ass'n, 426 A.2d 63 (N.J. Super. Ct. App. Div. 1981).

[101] North Clackamas School Dist. No. 12 v. North Clackamas Educ. Ass'n, 634 P.2d 1348 (Or. Ct. App. 1981).

[102] Board of Educ. of Brittonkill Cent. School Dist. v. Brittonkill Teachers Ass'n, 437 N.Y.S.2d 741 (N.Y. App. Div. 1981); Moriah Cent. School Dist. Bd. of Educ. v. Smith, 438 N.Y.S.2d 648 (N.Y. App. Div. 1981); and Salmon River Cent. School Dist. v. Salmon River Teachers Ass'n, 437 N.Y.S.2d 763 (N.Y. App. Div. 1981).

[103] Board of Educ., Mt. Sinai Union Free School Dist. v. New York State United Teachers, 435 N.Y.S.2d 977, 417 N.E.2d 89 (N.Y. 1980).

[104] United Liverpool Faculty Ass'n v. Board of Educ. of Liverpool Cent. School Dist., 438 N.Y.S.2d 505 (N.Y. 1981).

[105] Lanting v. Jenison Pub. Schools, 302 N.W.2d 631 (Mich. Ct. App. 1981).

Therefore, even though there was no express agreement to arbitrate whether teachers could be assigned to detention hall duty with no extra pay, the issue was arbitrable.[106] The Vermont Supreme Court also adhered to a broad construction, finding arbitrable a teacher's grievance that there were inadequate grounds to put her on probation when the contract defined grievance as a "claim by a teacher that there has been a violation, misinterpretation or misapplication of the terms of this agreement."[107]

A Florida court held that a union can file and process grievances in its own name,[108] but a New York court, over a strong dissent, held that a teachers union could not file a grievance in its own name when the dispute involved the rights of the employee and did not assert that the union's rights had been violated.[109] Regardless of whose name a grievance is filed in, the usual rule is that an employee cannot seek arbitration over the objection of the exclusive representative. However, as held by a Massachusetts court, this is not the case where the sole reason the exclusive representative refused to process the claim was because the grievant was not a union member.[110]

Where a school board expressly agreed to include in the teachers bargaining unit the position of school nurse to settle a prior dispute, the school board could not claim later the grievance procedure did not apply to school nurses[111] and that the "just cause" provision in the grievance procedure applied only to tenured teachers.[112] However, a Pennsylvania court construed a requirement that there be just cause for reduction in rank or compensation as applicable only to "professional employees" and, therefore, inapplicable to the head football coach, which was an extracurricular position.[113] The same court held also that a grievance procedure applicable to "discipline" did not encompass "discharge" since "[t]hey are not interchangeable words."[114]

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[106] Board of Educ., Commun. Consol. School Dist. 62, Cook Cty. v. Illinois Educ. Ass'n, 427 N.E.2d 789 (Ill. App. Ct. 1981).

[107] Bellows Falls Union High School Dist. No. 27 v. Rodia, 428 A.2d 1094 (Vt. 1981). *See also* Willink v. Webster Teachers Ass'n, 440 N.Y.S.2d 100 (N.Y. App. Div. 1981).

[108] Duval Cty. School Bd. v. Duval Teachers United, Local 3326, 393 So.2d 1151 (Fla. Dist. Ct. App. 1981).

[109] Horseheads Cent. School Dist. v. Horseheads Teachers Ass'n, 439 N.Y.S.2d 722 (N.Y. App. Div. 1981). *But see* Aloi v. Board of Educ. of West Babylon Union Free School Dist., 439 N.Y.S.2d 169, 171 (N.Y. App. Div. 1981) holding employees must sue through their union if they assert a claim under the collective bargaining agreements. *See also supra* note 80.

[110] Carbone v. School Comm. of Medford, 426 N.E.2d 452 (Mass. App. Ct. 1981).

[111] Franklin Cent. School v. Franklin Teachers Ass'n, 51 N.Y.S.2d 739 (N.Y. App. Div. 1980). *See* YEARBOOK 1981 at 119-120.

[112] *Id.*, *rev'g* 424 N.Y.S.2d 742 (N.Y. App. Div. 1980). *See* YEARBOOK 1981 at 120.

[113] Ringgold School Dist. v. Abramski, 426 A.2d 707 (Pa. Commw. Ct. 1981).

[114] Neshaminy Fed'n of Teachers v. Neshaminy School Dist., 428 A.2d 1023 (Pa Commw. Ct. 1981).

3.6b Judicial Review of Awards

3.6b(1) Standard of Review

The courts give great deference to arbitrators as shown by what happened when a lower court held that an arbitrator's award was invalid on the basis that it did not make a distinction between long term and per diem substitute teachers. The Pennsylvania Supreme Court reversed, explaining that a court has no business overruling an arbitrator because the court's interpretation of the contract is different from that of the arbitrator, even if the arbitrator made an erroneous interpretation, so long as it was rationally derived from the contract in light of its language, context and the intentions of the parties.[115] The Rhode Island Supreme Court termed the test this way: "We shall not vacate an arbitration award absent a manifest disregard of the provisions of a collective bargaining agreement or a completely arbitrary result."[116] An Indiana court used the same test of "manifest disregard" but extended it to interpretations of the law.[117] A New York court refused to vacate an arbitrator's award on assignment of teachers to cafeteria duty because it was not "wholly irrational."[118]

On the basis of such reasoning an Indiana court held that the fact that other arbitrators had interpreted a state law differently than the arbitrator did in the instant case was not a basis to vacate his award.[119] An Oregon court held that, due to the policy that favors binding arbitration as a means of dispute resolution, the state PERB could not decide whether to enforce an arbitrator's award by deciding whether the arbitrator was "palpably wrong."[120]

Three Pennsylvania cases dealt with the issue of whether or not an arbitrator exceeded his jurisdiction. In one case the court held that the fact the grievance did not use the words "inservice days" did not preclude the arbitrator from taking them into account. The court, in explaining why this did not constitute a case of the arbitrator going beyond his jurisdiction, stated "an arbitrator must be given a certain amount of flexibility to reach an amicable solution and should not be limited in his problem solving to the exact language of the grievance."[121] In the other, the appellate court ruled that a lower court could not hold that an arbitrator had no jurisdiction to determine whether senior high school teachers could be added to a grievance by elementary and junior high school teachers. The court explained that if the dispute was rationally related to the contrct subject matter, which the parties agreed to arbitrate, then all questions of procedural compliance were within the arbitrator's power to decide.[122] In the third case, the common pleas court held that an arbitrator had "inserted a non-existent provision" in the contract and overturned his award that unit employees responsible for maintenance were deprived of unit work, namely snow plowing, which was performed by supervisory personnel. The higher court held that although the arbitrator stated the contract was silent on the subject of barring supervisors from doing unit work, he was not precluded from making inferences based on other parts of the contract, and said inferences must be honored by the court.[123]

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[115] Leechburg Area School Dist. v. Dale, 424 A.2d 1309 (Pa. 1981) *rev'g* 401 A.2d 582 (Pa. Commw. Ct. 1979). *See* YEARBOOK 1980 at 132. *See also* West Jefferson Hills School Dist. v. Jefferson Fed'n of Teachers, 433 A.2d 643 (Pa. Commw. Ct. 1981).

[116] Providence Teachers Union Local 958 v. Providence School Comm., 433 A.2d 202, 205 (R.I. 1981).

[117] Southwest Parke Educ. Ass'n v. Southwest Parke Commun. School Trustees Corp., 427 N.E.2d 1140 (Ind. Ct. App. 1980).

[118] Central Square Teachers Ass'n v. Board of Educ. of Cent. Square Cent. School Dist., 437 N.Y.S.2d 663 (N.Y. 1981) *aff'g* 422 N.Y.S.2d 214 (N.Y. App. Div. 1979). *See* YEARBOOK 1980 at 150. *See also* Board of Educ. of Three Village Cent. Schools v. Three Village Teachers Ass'n, 438 N.Y.S.2d 593 (N.Y. App. Div. 1981).

[119] Indiana Dept. of Admin. Personnel Div. v. Sightes, 426 N.E.2d 445 (Ind. Ct. App. 1981).

[120] Willamina Educ. Ass'n v. Willamina School Dist. 30J, 423 P.2d 658 (Or. Ct. App. 1981).

3.6b(2) Propriety of Award

Even in the few situations when courts went on to examine the validity of the arbitrator's award, they more frequently upheld awards than they vacated them. In a decision in which the court's reasoning has implications beyond the scope of an arbitrator, the Illinois Supreme Court upheld an arbitrator's finding that the collective bargaining agreement was a proper basis to confer benefits in addition to those provided by the Workmen's Compensation Act to an elementary school teacher who was viciously assaulted in the hall outside her classroom and was unable to resume her teaching duties for eighteen months.[124] The court viewed double recovery under these circumstances as reasonable on the basis:

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[121] McKeesport Area School Dist. v. McKeesport Area Educ. Ass'n, 424 A.2d 979, 982 (Pa. Commw. Ct. 1981).

[122] Shaler Area Educ. Ass'n v. Shaler Area School Dist., 433 A.2d 168 (Pa. Commw. Ct. 1981).

[123] District Council 83, American Fed'n of State Employees v. Hollidaysbury Area School Dist., 432 A.2d 304 (Pa. Commw. Ct. 1981) *relying on* Leechburg Area School Dist. v. Dale, 424 A.2d 1309 (Pa. 1981). *See supra* note 115.

[124] Board of Educ. of City of Chicago v. Chicago Teachers Union Local No. 1, 427 N.E.2d 1199 (Ill. 1981) *aff'g* 402 N.E.2d 641 (Ill. App. Ct. 1980). *See* YEARBOOK 1981 at 117.

> From the teacher's point of view, double recovery protects teachers financially if they are assaulted and deters violence by encouraging the board to provide adequate security in order to conserve its own purse strings. From the board's point of view double recovery is an inducement to teachers to put aside their fears and teach in schools which have gained a reputation for violence.[125]

The Pennsylvania Commonwealth court upheld an arbitrator's determination of arbitrability with respect to the vacation entitlement of twelve-month employees despite the fact the collective bargaining agreement nowhere addressed the issue. The court stated that "few matters could be more centrally related to the interpretation of a collective bargaining agreement than the length of the required work year as an obligation of the employees and the length of their vacations as a benefit complementary thereto."[126] The same court also held that an arbitrator properly could look to past practice which occurred after the effective date of the collective bargaining agreement as an aid to interpreting that agreement.[127] The court also upheld an arbitrator's interpretation that the public school code allowed a school district to reduce staff without having to show that suspensions were based upon a substantial decline in enrollment.[128]

In one of the two awards vacated, a New York court relied on "clear public policy" to vacate an arbitrator's award that sustained a grievance by custodial workers that they should have been given work necessary before and after basketball games. The work was performed at no cost by student volunteers as the result of the school district's lack of funds to conduct a basketball program and as the result of the donations of citizens to fund the program, but which fell short of meeting all costs associated with the program. The court concluded that it was contrary to public policy to require gift money to be expended on a nonexistent debt.[129]

Relying on cases decided by Delaware, Minnesota, and Washington courts, a Pennsylvania court held that an arbitrator could not sustain grievances by teachers who were denied renewal of contracts to be advisors to student extracurricular activities, since teachers when acting in the capacity of advisors are not professional employees and as such are not covered by the collective bargaining agreement.[130]

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[125] Board of Educ. of City of Chicago v. Chicago Teachers Union Local No. 1, 427 N.E.2d at 1202.

[126] Appeal of Chester Upland School Dist., 423 A.2d 437, 440 (Pa. Commw. Ct. 1981).

[127] Northwest Tri-County Intermediate Unit No. 5 Educ. Ass'n v. Northwest Tri-County Intermediate Unit No. 5, 432 A.2d 1152 (Pa. Commw. Ct. 1981).

[128] Appeal of Portage Area Educ. Ass'n, 432 A.2d 1170 (Pa. Commw. Ct. 1981).

[129] Onteora Cent. School Dist. at Boiceville v. Onteora Non-Teaching Employees Ass'n, 4[illegible]8 N.Y.S.2d 386 (N.Y. App. Div. 1981).

3.6b(3) Remedies

The deference given to arbitrability and to an arbitrator in making his or her award applies also to the remedy fashioned by the arbitrator. An Indiana court stated "it is only where he affords a form of relief that public policy does not permit the parties to voluntarily agree to, that he so acts beyond his jurisdiction that the award is void and subject to collateral attack." Using this test and referring to the public policy that punitive damages are not to compensate a party for its injury but to punish wrongdoers and deter future misconduct, the court concluded that the arbitrator acted improperly in assessing attorney fees as punitive damages when he found the school had unintentionally violated its agreement.[131] An Oregon court held that since an arbitrator has authority to formulate an appropriate remedy, an arbitrator properly remedied the improper evaluation of a probationary teacher by reinstating her for a fourth probationary year which would not confer tenure after three years.[132]

3.7 EFFECT OF THE LEGISLATIVE PROCESS

The method by which collective bargaining obligations are funded in the public sector creates a complication which does not exist in the private sector. In recent years the complexities, caused by the fact that there are several entities that can affect such funding and caused by the fact that there are sometimes multiple sources of funds, have been further complicated by a severe drop in revenue to provide such funds.

This precise problem faced the Massachusetts Supreme Court when the Boston School Committee (Boston's name for a school board) asked the mayor to submit to city council a request for a supplemental appropriation of 12.1 million dollars to fund the collective bargaining agreement it executed with the teachers' union and an additional three million to fund anticipated but unexecuted contracts with other unions. The court agreed with the teachers union that the mayor had no discretion, as he claimed he had, to refrain from submitting the request, but also held that he was not required to request monies for the contracts which had yet to be executed. After the mayor complied and the city council approved the appropriation, the mayor vetoed it. The court held that, since the mayor had no role as an "employer" or as an appropriate legislative body, his veto power did not apply to funding of a collective bargaining agreement since otherwise he would frustrate the negotiation process when he has no formal role with respect to that process. To facilitate this result the court held further that is was proper to enjoin the setting of the city's tax rate until the appropriation requests had been submitted and properly acted upon.[133]

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[130] Greater Johnstown Area Voc.-Tech. School v. Greater Johnstown Area Voc.-Tech. Educ. Ass'n, 426 A.2d 1203 (Pa. Commw. Ct. 1981). *Cf. supra* note 113.

[131] School City of East Chicago, Indiana v. East Chicago Fed'n of Teachers Local 511, 422 N.E.2d 656 (Ind. Ct. App. 1981).

[132] North Clackamas School Dist. No. 12 v. North Clackamas Educ. Ass'n, 634 P.2d 1348 (Or. Ct. App. 1981).

According to the Pennsylvania Commonwealth Court neither the school board nor the teachers' union had mutual obligations to each other for the second year of their collective bargaining agreement when legislative bodies independent of the school board failed to appropriate sufficient revenue to fund the agreement.[134] In effect, the court held that each year was severable, dependent upon the condition precedent of full funding. Although an agreement between the union and the board of education established a fixed schedule of wage increases over a five-year period, a Tennessee court ruled that the pay schedule for each year was not binding until the county commissioners approved the funding. As in Pennsylvania, the court held that the union's only remedy was to renegotiate the contract when such funding was insufficient.[135]

3.8 IMPASSE AND DISPUTE RESOLUTION

3.8a Fact Finding and Arbitration

In Maine, a school committee contested the constitutional validity of the state law which authorizes private arbitrators to issue binding decisions to resolve negotiation impasses. The challenge was premised on the claim that there were inadequate standards or safeguards to protect against unfair and arbitrary decisions. The Maine Supreme Court upheld constitutionality, stating that the ever-widening use of arbitration has resulted in the evolution of criteria which have become inherent in today's arbitration process.[136] The court, relying on supreme court decisions in Minnesota, New Jersey, and Pennsylvania (none of which involved education employees), added that in any event:

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[133] Boston Teachers Union Local 66 v. City of Boston, 416 N.E.2d 1363 (Mass. 1981).

[134] Philadelphia Fed'n of Teachers Local No. 3 v. Thomas, 436 A.2d 1228 (Pa Commw. Ct. 1981).

[135] Carter Cty. Bd. of Educ. Comm'rs v. American Fed'n of Teachers, 609 S.W.2d 512 (Tenn. Ct. App. 1980).

[136] Superintending School Comm. of City of Bangor v. Bangor Educ. Ass'n, 433 A.2d 383 (Me. 1981).

> Formulation of rigid standards for the guidance of arbitrators in dealing with complex and often volatile issues would be impractical, and might destroy the flexibility necessary for arbitrators to carry out the legislative policy of promoting the improvement of the relationship between public employers and their employees.[137]

3.8b Rights on Expiration of Contract during Impasse

In a Maine case, when the school year started the teachers' collective bargaining agreement had expired and negotiations continued for a successor agreement. Returning teachers continued to be paid the same salary but did not receive increases required by the longevity and education steps in the old contract, while newly hired teachers were paid in accordance with the schedule. The result was that new teachers were paid more than returning teachers with the same experience and education. The Maine Supreme Court upheld the state labor relation board's finding that the old contract did not continue and that the school board should cease and desist paying new teachers disparate salaries. However, the court rejected the union's plea to increase the pay of the returning teachers (since their schedule had expired) or to require the new teachers to refund their excess salary (because they were innocent beneficiaries).[138]

The North Dakota Supreme Court ruled after the expiration of a collective bargaining agreement and after fact finding had been used, a school board cannot require teachers to return their contracts to the school within thirty days if the request is made after circumstances of "compulsion."[139]

Rights to continue negotiated grievance provisions after the expiration of the contract are discussed under Section 3.6a(4).

3.9 CONCERTED ACTIVITY

3.9a Strikes

Although most litigation over a "right" to strike has subsided, litigation has continued on what actually constitutes a strike or whether the conditions required to be met in a state allowing a right to strike have actually been met. This year litigation over the existence of a strike took on a different dimension. Four Pennsylvania cases involved questions about whether a strike existed to determine eligibility for unemployment compensation. Thus, when the school district passed a resolution that it would not commence classes after the summer vacation until a collective bargaining agreement was consummated, and did not reopen classes until October 5, the commonwealth court concluded the teachers were locked out and were eligible for unemployment benefits.[140] A school board which merely "extended" the summer break while negotiations were continuing similarly was held to have locked out its employees.[141] The same result also was reached in a situation in which the school board offered to continue terms and conditions of employment under the expired contract for an indefinite period if the teachers union agreed to provide five days written notice of its intent to strike. The union agreed to resume work under the old contract until September 15 and did so until it commenced a strike on September 17, but because the school board on September 14 issued pay checks which did not include longevity increases required by the former contract, the court held the school board was the first to change the status quo and, therefore, employees were due unemployment benefits.[142]

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[137] *Id.* at 387.

[138] Maine School Admin. Dist. No. 43 Teachers Ass'n v. Maine School Admin. Dist. No. 43 Bd. of Dirs., 432 A.2d 395 (Me. 1981).

[139] Wilton Educ. Ass'n v. Mountefiere Dist. No. 1, 312 N.W.2d 324 (N.D. 1981).

In still another Pennsylvania case, the court stated that because the parties "labored under a mistake in fact" that revenues to implement their agreement would be forthcoming and due to the confusion over the obligations resulting from the absence of such funding, a strike which ensued and was enjoined by a lower court would not be viewed as illegal although the legal result of the funding problem was to reopen the contract and to subject them to impasse procedures which preclude a strike. The strike would be illegal if it continued after the court's decision.[143]

3.9b Grounds for Injunctions

Since there was no evidence that the time it would take to give notice would have aggravated, increased or in any way affected the injury alleged by a strike, the mere illegality of a teachers strike was an insufficient basis to not provide notice to the attorney of the striking teachers union and to issue an ex parte injunction, according to the Illinois Supreme Court.[144]

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[140] Centennial School Dist. v. Pennsylvania Unemployment Comp. Bd. of Review, 424 A.2d 568 (Pa. Commw. Ct. 1981).

[141] Mountain View School Dist. v. Pennsylvania Unemployment Comp. Bd. of Review, 436 A.2d 1225 (Pa. Commw. Ct. 1981).

[142] Union City Area School Dist. v. Pennsylvania Unemployment Comp. Bd. of Review, 434 A.2d 239 (Pa. Commw. Ct. 1981). *See also* Fairview School Dist. v. Pennsylvania Unemployment Comp. Bd. of Review, 434 A.2d 884 (Pa. Commw. Ct. 1981).

[143] Philadelphia Fed'n of Teachers Local No. 3 v. Thomas, 436 A.2d 1228 (Pa. Commw. Ct. 1981).

When a Missouri court issued a temporary restraining order against a strike by a teachers union, the court further ordered the parties to "meet and confer in good faith in an attempt to resolve the present salary dispute which led to the alleged current work stoppage." However, an appellate court held that the lower court judge exceeded his powers and that courts should not act as labor mediators, adding that a school board's power to fix compensation are not subject to interference by a court.[145] Not dissimilarly, a Pennsylvania court held that a local judge exceeded his authority by including in his back-to-work order a requirement that the parties should temporarily use the terms and conditions of employment last offered by the school district.[146] However, the court required the parties to restore the status quo by implementing all terms of the last valid contract, which resulted in the rehiring of laid off employees.[147]

3.9c Enforcement Actions

The Massachusetts Supreme Court held for the first time in a civil contempt proceeding that a coercive prospective order may be entered to direct the payment of a fine for each day the teachers union continued to strike in contempt of an injunction against the strike, but laid down principles for determining the amount of the fine. These included the union's financial resources, the character and magnitude of the threatened harm, the probable effectiveness of any suggested sanction, and the seriousness of the financial burden on the union; but the fine cannot take into account the money saved by the school due to the strike and may not be punitive.[148]

In addition, a New York court held that a school district's delay in commencing deductions for penalties for an illegal strike did not extend the time for deducting withholding taxes after the determination that the strike was illegal.[149]

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[144] Board of Educ. of Commun. Unit School Dist. No. 101 v. Parlor, 424 N.E.2d 1152 (Ill. 1981) *aff'g* 402 N.E.2d 388 (Ill. App. Ct. 1980). *See* YEARBOOK 1981 at 126.

[145] Parkway School Dist. v. Provaznik, 617 S.W.2d 489 (Mo. Ct. App. 1981).

[146] Philadelphia Fed'n of Teachers Local No. 3 v. Thomas, 436 A.2d 1228 (Pa. Commw. Ct. 1981).

[147] *Id.* at 1235.

[148] Massachusetts Labor Relations Comm'n v. Fall River Educators Ass'n, 416 N.E.2d 1340 (Mass. 1981) *aff'g* 105 LRRM 3157 (Mass. Super. 1979). *See* YEARBOOK 1981 at 127.

[149] Tepper v. Wyandanch Union Free School Dist., 436 N.Y.S.2d 665 (N.Y. Sup. Ct. 1981).

3.10 PUBLIC EMPLOYMENT RELATIONS BOARDS

3.10a Unfair Labor Practices

Some unfair labor practices (ULPs) are not discussed under this heading because they already have been discussed under other headings, *e.g.*, scope of bargaining. At the same time some ULPs have not fit under other headings because of the subject matter involved in the ULP or because the heading did not permit discussion of ULPs. Illustrative of the last category are tenure issues arising in the context of grievance arbitration. The same issues arise under ULPs as arise in the cases discussed under 3.6a(6). For example, the South Dakota Supreme Court was faced with a school board's challenge to the state department of labor's reinstatement of a nontenured teacher on the basis that evaluation procedures required by the collective bargaining agreement had been violated. The court held that a school board may refuse to continue a nontenured teacher without giving a reason and that this right cannot be negotiated away. Although the court further found that limitations can be negotiated which could result in reinstatement without tenure, it held noncompliance with evaluation procedures would have to be shown to have substantially and directly impaired the teacher's ability to improve himself or herself and to attain continuing contract status. In the case before it, the court held the violations did not clearly produce such a result but did allow the purging of evaluation remarks in the teacher's personnel file.[150]

However, a Massachusetts court held that if the reinstatement authority of the state labor relations commission is to be truly effective, the commission must place a teacher in the same position he would have enjoyed but for unlawful discrimination, with the result that teachers denied tenure in reprisal for their union activities must be reinstated with tenure.[151]

An important PERC holding was that of the Massachusetts Labor Relations Commission with respect to the suspension of teachers who not only had led a boycott of a parents' night sponsored by the union. Only the two leaders were suspended although no other teachers particicipated in the night sponsored by the school. The commission found a ULP on the basis that attendance could not be said to be a duty of employment since in the only prior parents night teacher participation was voluntary. In addition, the alternate night was found to be a protected right of free speech aimed at reaching the public to present the union's position. It was not found to be a disloyal disparagement of the school district's "product" and did not purport to be an official function which amounted to an arrogation of the employer's right to run the enterprise.[152]

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[150] Fries v. Wessington School Dist., 307 N.W.2d 875 (S.D. 1981).

[151] Southern Worcester Cty. Regional Voc. School Dist. v. Massachusetts Labor Relations Comm'n, 422 N.E.2d 791 (Mass. App. Ct. 1981).

In addition, a New Jersey court held that although the state PERC found parity provisions in a collective bargaining agreement with regard to otherwise negotiable subjects are illegal, the PERC's ruling should not be applied retroactively to contractual provisions negotiated prior to that ruling.[153] The South Dakota Supreme Court concluded that a ULP committed by a school district during negotiations was not mooted by the parties' voluntarily entering into a new agreement, since it is of vital interest to other school districts and unions to better know and understand the latitude allowed in negotiations and because the existence of a dispute, particularly one associated with negotiations, portends a recurrence of the exact situation complained of to the court.[154]

3.10b Other Practices and Procedures

A complaint filed by a school district with a court with regard to an alleged breach of the teachers union's negotiated agreement not to strike posed to a California court the question whether the school district had to first exhaust PERB proceedings because the alleged strike would constitute a ULP. However, the California law also allows a collective bargaining agreement to be litigated in court. The court reached what it termed an "accommodation" of the two provisions, since it found it held concurrent jurisdiction as to the contract cause of action, and stayed, rather than dismissed, the action so that the court could take whatever action was appropriate after the PERB dealt with the ULPs.[155] However, the Nebraska Supreme Court held that an alleged breach of contract must be filed with the court rather than with the PERC (which in Nebraska is entitled Commission of Industrial Relations).[156] The Pennsylvania Supreme Court reached an evenly split decision on a challenge by special education teachers and others to the salary schedule set forth in the collective bargaining agreement when

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152. *In re* Southeastern Regional School Dist. Comm., Massachusetts Labor Relations Comm'n Case No. MUP-2970 (1981).

153. Board of Educ. of Twp. of Willingboro v. Employees Ass'n of Willingboro Schools, 429 A.2d 429 (N.J. Super. Ct. App. Div. 1981).

154. Stanley Cty. School Dist. No. 57-1 v. Stanley Cty. Educ. Ass'n, 310 N.W.2d 162 (S.D. 1981).

155. Fresno Unified School Dist. v. National Educ. Ass'n, 177 Cal. Rptr. 888 (Cal. Ct. App. 1981).

156. Saltz v. School Dist. of Norfolk, 305 N.W.2d 635 (Neb. 1981).

the challenge was in the form of a court action claiming illegality of the agreement and that the union failed to meet its duty of fair representation, although those viewing the matter as more properly a ULP held the court had jurisdiction since the plaintiffs disavowed a ULP had been committed and waived any ULP remedy.[157]

Like a number of courts and PERBs, a Florida court held that it was pertinent and instructive to utilize and rely upon decisions of the National Labor Relations Board to determine the rule of law with respect to public employees.[158]

3.11 MISCELLANEOUS

Among other issues faced during the past year has been the affiliation of unions. The Pennsylvania Commonwealth Court held that the matter of union affiliation with statewide and national organizations, accompanied by a commensurate increase in annual dues, was an internal union affair which the union had the right to govern without judicial interference.[159] Additionally, a Missouri court ruled that a state organization had no right as a parent organization to prevent the local district organization from disaffiliating from it.[160]

The Rhode Island Supreme Court found that once teachers elected to utilize the grievance procedure to dispute whether their salaries under the collective bargaining agreement were subject to the wage freeze imposed by then President Richard M. Nixon, they were foreclosed from seeking redress in court.[161]

In a Michigan breach of collective bargaining agreement action for failing to properly recall teachers from layoff, the court ruled that the teachers were obligated to mitigate damages by seeking employment elsewhere but were not obligated to accept positions as "Emergency Substitute in Regular Position" which paid substantially less and was a position of "lower status."[162]

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[157] Robinson v. Abington Educ. Ass'n, 423 A.2d 1014 (Pa. 1980).

[158] School Bd. of Polk Cty. v. Florida PERC, 399 So. 2d 520 (Fla. Dist. Ct. App. 1981).

[159] Pennsylvania Labor Relations Bd. v. Eastern Lancaster Cty. Educ. Ass'n, 427 A.2d 305, 310 (Pa. Commw. Ct. 1981).

[160] Missouri State Teachers Ass'n v. St. Louis Suburban Teachers Ass'n, 622 S.W.2d 745 (Mo. Ct. App. 1981).

[161] Cranston Teachers Ass'n v. Cranston School Comm., 423 A.2d 69 (R.I. 1980).

[162] Harper Woods Fed'n of Teachers v. Board of Educ. of School Dist. of Harper Woods, 302 N.W.2d 857 (Mich. Ct. App. 1981).

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PUPILS

Henry S. Lufler, Jr.*

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4.0 INTRODUCTION

Litigation involving pupils occurred with greater frequency in the areas raising questions about handicapped students, student testing, and church-state separation. Fewer cases addressed issues concerning student transportation and discipline. Desegregation litigation continued, with incremental decisions in a number of longstanding suits, but no new Supreme Court opinions to further direct the arguments were recorded.

The most important cases recorded in the pupil's chapter this year concern circuit courts of appeal decisions in the handicapped and testing areas. In the handicapped litigation, appellate courts have continued to require impartial hearings in cases involving the placement of handicapped children, but have stopped short of requiring costly separate programs for such students, holding that "adequate" placements are sufficient. For the first time, a circuit court of appeal addressed the use of competency tests as a graduation requirement and, in a decision which may affect the use of these increasingly popular instruments, held that it was necessary for a school system to prove that the tests actually measured what was taught in their own system before they could be used.

4.1 HANDICAPPED AND EXCEPTIONAL CHILDREN

Cases involving the treatment of children determined to be handicapped under the terms of the Education for All Handicapped Children Act of 1975 (EHCA) continued to increase in 1981. Last year, twenty-six cases were reported in this section of the *Yearbook*, while thirty-eight cases are reported in this year's book. Many of these cases concern the administrative proceedings to be followed when determining a handicapped child's placement, as detailed in EHCA. Others contest the placement ultimately determined by the process. In contrast with previous years, courts in 1981 showed an increased reluctance to order separate and costly educational programs for handicapped children. Several decisions held that the EHCA requirement of an "appropriate" placement did not necessarily mean that the child was entitled to the "best" or most costly placement. "Adequate" placements found support.

A number of these cases are now reaching federal circuit courts of appeal and some may reach the United States Supreme Court in 1982. The courts of appeal are holding that EHCA placement hearings must be truly impartial, meaning that the rulings of hearing examiners cannot be overruled by state superintendents of public instruction. At the same time as the EHCA due process procedures are receiving support, however, courts are showing more reluctance to reach independent judgments on services for handicapped children until such procedures are exhausted. Finally, two cases in the right-to-education portion of this section have expanded the services required by EHCA to youths incarcerated in juvenile detention facilities and in a state school for the retarded.

4.1a Tuition and Assignment

Several 1981 cases reviewed the question of what constitutes an "appropriate placement" for handicapped children under the requirements of EHCA. Parents and school districts often differ on the issue and the cost of the several alternatives which are available sometimes varies considerably. This was the situation in an Arkansas case which was decided by the Eighth Circuit Court of Appeals.[1] The parents of an eleven-year-old profoundly deaf child had asked that instruction for their daughter be provided within their local school district, rather than at the residential state-run school for the deaf. The district and the Arkansas State Department of Education had decided that the school represented the best placement, but the parents disagreed. The district court held in 1980 that the "best" placement was available at the school, but that an "adequate" placement was available locally, without the need to separate the child from her parents.[2] The appeals court sustained this ruling, noting that the mainstreaming requirement of EHCA would be enhanced by the local placement, and that "appropriate" should not always be interpreted to mean "best placement" in circumstances where the child would be separated from parents. The school district has appealed the case to the United States Supreme Court.

A Virginia federal district court also ruled that "appropriate" did not always mean the "best" placement, this time overruling the request of parents who wanted their child sent to a residential treatment facility.[3] While agreeing that the residential treatment facility might be better, the court held that "neither they nor any other parents have the right under the law to write a prescription for the ideal education for their child and to have the prescription filled at public expense."[4] The court ruled that the plan for an individualized education program developed by the school district was adequate. In a similar case, a Pennsylvania appeals court also approved a school district's plan for a physically handicapped child, over objections by parents that the plan was not the "best" which could be devised, holding that an "adequate" program was all that was required.[5]

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[1] Springdale School Dist. v. Grace, 656 F.2d 300 (8th Cir. 1981).

[2] Springdale School Dist. v. Grace, 494 F. Supp. 266 (W.D. Ark. 1980). *See* THE YEARBOOK OF SCHOOL LAW 1981 (P. Piele, ed.) [hereinafter cited as YEARBOOK 1981] at 139.

[3] Bales v. Clarke, 523 F. Supp. 1366 (E.D. Va. 1981).

Parents of a learning disabled Virginia child filed suit to obtain a remedial program at the school closest to their residence, rather than at a school six miles farther away.[6] The child required a program which included a minimum of three hours of special instruction each day in a special class. To conserve funds, the district elected to place the child in a program operated at a school in an adjacent county. Despite the fact that the child had developed an attachment to the elementary school closest to her home, the court concluded that the slightly more distant placement was adequate, considering the costs which were involved. The school district was obligated to provide the transportation costs. The parents' claims were dismissed.

A decision made by the New York City School District to transfer a child with a minimal brain dysfunction to a public school program from a residential facility was challenged by the child's parents.[7] The parents argued that the child had made significant progress at the special school and that no transfer was possible unless it was determined that the original school was an "inappropriate" setting. The district court disagreed and therefore rejected the parents' request for a preliminary injunction barring the transfer. Noting the long waiting list of students awaiting placement in special education classes, the court held that transfers were possible while hearings challenging such transfers continued. The court also declined to order the district to pay the special school tuition during the appeals process, as requested by the parents.

A Texas federal district court ordered the residential placement of a schizophrenic child over the objections of the school district that a six-hour in-school program was adequate.[8] In this instance, the court was swayed by the argument that the intense handicaps suffered by the child made private school placement the only "appropriate" placement called for by EHCA. Even though the child was severely handicapped and the evidence in the case suggested that institutionalization might not be successful, the court concluded that "[t]he language and legislative history of the Act simply do not admit of the possibility that some children may be beyond the reach of our educational expertise."[9]

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[4] *Id.* at 1370.

[5] Shanberg v. Commonwealth Secretary of Educ., 426 A.2d 232 (Pa. Commw. Ct. 1981).

[6] Pinkerton v. Moye, 509 F. Supp. 107 (W.D. Va. 1981).

[7] Zvi D. v. Ambach, 520 F. Supp. 196 (E.D.N.Y. 1981).

[8] Gladys J. v. Pearland Indep. School Dist., 520 F. Supp. 869 (S.D. Tex. 1981).

A variety of 1981 cases raised questions about the tuition support to be received by parents with children in private schools specializing in the care of handicapped children. In an important case, the attempt by the New York commissioner of education to establish maximum tuition limits at such schools was struck down.[10] The commissioner had placed a limit of 4.5 percent across-the-board for all staff salary increases at the private schools. The private schools noted that other state regulations now required that all teachers in such institutions be state-certified and pointed to other cost increases brought about by state regulations. The appeals court concluded that the commissioner did have the authority to set tuition payment levels, but that the setting of salary limits was not done as part of a formal rule-making process and therefore was arbitrary. The matter of setting the 1979-80 tuition rates, then, was remanded to the commissioner for further consideration. The request made by the private schools to allow their proposed tuition levels to stand unchanged was also rejected.

In a case reported last year, and subsequently appealed, the power of the New York commissioner to place New York students in public out-of-state residential facilities was upheld by a New York appeals court.[11] The plaintiffs had argued that placements at out-of-state private facilities were possible, but that public facilities could not be used. The court disagreed, holding that New York education law did not limit such placements.

A Massachusetts school committee argued that they could not be required to place handicapped children in private institutions because such placement would violate a state constitutional amendment prohibiting the use of public funds for the purpose of "founding, maintaining or aiding private schools."[12] The case originated in 1976 and took five years to resolve; private school placements continued while the issue was litigated. After a lengthy review of cases related to the support of private schools with public funds, the appeals court concluded that such aid was not "substantial," did not have as its "primary purpose" the aid of such schools, and passed the court's "political and economic abuse test." The tuition was therefore ordered to be paid. Failure to do so, the court noted, would violate the requirements of EHCA calling for the "most appropriate" placements.

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[9] *Id.* at 879.

[10] Organization to Assure Servs. v. Ambach, 440 N.Y.S.2d 390 (N.Y. App. Div. 1981).

[11] Dubner v. Ambach, 437 N.Y.S.2d 659 (N.Y. 1981); Dubner v. Ambach, 426 N.Y.S.2d 164 (N.Y. App. Div. 1980). *See* YEARBOOK 1981 at 139, 239-240.

[12] Commonwealth v. School Comm. of Springfield, 417 N.E.2d 408 (Mass. App. Ct. 1981).

Two cases raised the issue of who would pay the tuition at a private school for handicapped children if parents unilaterally moved their child to the institution before administrative appeals proceedings were exhausted. In a District of Columbia case, the parents had made attempts to resolve the issue and were confronted with a "less than responsive" educational bureaucracy.[13] Despite the fact that the parents faced "an extraordinary burden," the court concluded that the parents should have first continued their administrative appeal or should have sought a preliminary injunction rather than making their own placement decision. In the second case, the Connecticut Supreme Court made the tuition award after concluding that the parent's action was not "unilateral" when the facts of the case were considered.[14] Both the parents and the school district had agreed to the private school placement but the state had delayed in approving the arrangement. While concluding that the parents "were at their peril" in making their placement before the case had been resolved, the Connecticut court concluded that their failure to wait did not harm their claim in an instance where the placement was ultimately approved.

A Pennsylvania federal district court discovered that the Commonwealth of Pennsylvania did not have an administrative procedure whereby parents could recover tuition costs.[15] Following the EHCA administrative appeals process, it was determined that the child had been appropriately placed in an out-of-state residential facility for children with emotional and learning disabilities. Having concluded that the parents were entitled to the tuition, however, the court was at a loss to find the state administrative procedure whereby the claim might be pressed. The court concluded, however, that the parents were "aggrieved," under the terms of EHCA. It remanded the case for determination of where the parents might obtain the funds.

In another Pennsylvania case, a private school claimed tuition from the school district in which it was located for the educational services received by an out-of-state student who was enrolled in the school.[16] An appeals court concluded that it was proper to charge the out-of-state district which had been reluctant to pay the tuition.

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[13] Foster v. District of Columbia Bd. of Educ., 523 F. Supp. 1142 (D.D.C. 1981).

[14] Board of Educ. of the Town of Manchester v. Connecticut State Bd. of Educ., 427 A.2d 846 (Conn. 1980).

[15] Hark v. School Dist. of Philadelphia, 505 F. Supp. 727 (E.D. Pa. 1980).

[16] Nelson v. Tuscarora Intermediate Unit No. 11, 426 A.2d 1234 (Pa. Commw. Ct. 1981).

In another dispute between two districts over a tuition charge, a North Carolina appeals court concluded that parents lacked standing to file a claim in the matter.[17] The parents had argued that their daughter would not receive an appropriate education until the matter was resolved, but the court disagreed, noting that the tuition would be paid by one of the disputing parties. A similar case in Massachusetts resulted in dismissal of a request for tuition payment for an earlier year, but required the involvement of the state department of education to determine which entity was responsible for the succeeding years.[18]

Several 1981 cases concerned the due process rights of parents to an impartial placement hearing before handicapped students are assigned to a remedial program. The role of the hearing officer was the subject of litigation before the Fifth Circuit Court of Appeals.[19] The Education for All Handicapped Children Act (EHCA) requires that an impartial hearing officer make contested placements. Under the challenged Georgia procedures, the hearing officer was treated as a "special master" who made recommendations to the Georgia Board of Education. The recommendations could be ignored, however, and EHCA, the appeals court concluded, required that such decisions be reversed only in a court of law. The Fifth Circuit concluded that the system saved the state from following some costly decisions with which it disagreed, and "undermined the enforcement structure created by the Act." The court added that "[a]fter considerable time and expense, the state or federal court will be forced to become the guardian of rights which should in the first instance be protected by the administrative process mandated by the EHCA."[20]

The Eighth Circuit Court of Appeals also ruled on the question of who shall hear an appeal.[21] In a holding similar to the Fifth Circuit case just reported, the Eighth Circuit concluded that the Iowa superintendent of public instruction could not preside over EHCA placement hearings. The superintendent had tried to argue that he was not an "employee of the agency" within the meaning of § 1415(b)(2) of EHCA, but the court disagreed, concluding that the Act intended the hearing officer to be sufficiently removed from the proceeding as to have no stake in its outcome.

The role of hearing officers in Nebraska was the subject of an appeal heard by the Eighth Circuit Court of Appeals.[22] The plaintiffs in the

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17. Linder v. Wake Cty. Bd. of Educ., 273 S.E.2d 735 (N.C. App. 1981).
18. Doe v. Anrig, 500 F. Supp. 802 (D. Mass. 1980).
19. Helms v. McDaniel, 657 F.2d 800 (5th Cir. 1981).
20. *Id.* at 806.
21. Robert M. v. Benton, 634 F.2d 1139 (8th Cir. 1980).
22. Monahan v. State of Nebraska, 645 F.2d 592 (8th Cir. 1981).

case argued that a provision of Nebraska's statute governing the placement hearing was in conflict with EHCA because it gave the state commissioner of education the power to review a hearing officer's decision. The federal district court had granted a preliminary injunction to one of two student plaintiffs, ruling that the commissioner's review powers violated the Act, and had ordered a rehearing for the student.[23] In reviewing this decision the court of appeals concluded that the requirements for the issuance of a preliminary injunction had been met. The court did set aside the order for the rehearing, however, concluding that it was so late in the school year that the federal district court would be better advised to consider "alternative relief." While refusing to set aside the lower courts preliminary injunction, the Eighth Circuit did not reach a final decision on the role of the commissioner.

A District of Columbia court held that a hearing officer must consider a variety of possible placements for a child, not just the one with the least financial impact on a school district, when making a decision on the best placement for a child.[24] The parents of a learning disabled child filed suit when the officer only considered the placement recommended by the school district. That placement appeared, on the record, to be inappropriate when the child's handicaps were weighed. In remanding the case, and demanding a speedy decision, the court asked the hearing officer to weigh a variety of choices for the child and to recommend a placement "regardless of its cost or who should bear that cost."

In a case with significant procedural complexity, the First Circuit Court of Appeals ruled that a handicapped child's placement review could not be held under the provisions of a Massachusetts statute governing administrative appeals.[25] The Massachusetts procedure requires that administrative decisions be supported by "substantial evidence," while the EHCA procedures require that decisions be based on a more rigorous "preponderance of the evidence" standard. Because of the two different standards, the First Circuit concluded that it would be possible for the two different appeals processes to generate two different, yet legitimate, holdings in the same case. Under these circumstances, the court of appeals concluded that the federal review took precedence. After ruling on a number of other issues, the case was remanded to the district court for trial on the placement of the child.

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[23] Monahan v. State of Nebraska, 491 F. Supp. 1074 (D. Neb. 1980). *See* YEARBOOK 1981 at 141, 237-38.

[24] Davis v. District of Columbia Bd. of Educ., 522 F. Supp. 1102 (D.D.C. 1981).

[25] Town of Burlington v. Department of Educ., 655 F.2d 428 (1st Cir. 1981).

It is a generally held principle in cases involving placement hearings that it is not necessary for parents to exhaust administrative remedies if doing so would be futile.[26] A Louisiana case raised the issue of whether the failure of a parish to develop a plan for the education of handicapped children in the jurisdiction made administrative appeal "futile."[27] Handicapped students from the parish in question had been receiving educational services in a nearby parish, but the service was ended at the start of the 1979-80 school year. Charging that no subsequent arrangement for the special education of their children was adopted, plaintiffs filed suit in federal district court. In dismissing the case without prejudice, the court concluded that the plaintiffs would not suffer "irreparable harm" if the state administrative review processes were followed.

School officials in Washington, D.C. denied parents a hearing on a change of educational placement because the parents had not made the request on the official form provided for that purpose.[28] The student had been transferred to another special school with the parents' consent. After the transfer, however, the parents noted that the student was regressing, both educationally and emotionally. After raising questions about the placement, the parents obtained counsel and were informed that the district's decision to continue the placement was not a decision requiring a hearing and, if the parents wished to contest the placement, they should have submitted a form at an earlier stage of the proceedings. The district court dismissed these arguments. The court held that the distinction between a new and continuing placement was "a meaningless exercise in semantics, as far as the review procedures warranted by each are concerned."[29] The court also ruled that the parents were not informed in a timely fashion about the use of the form. A hearing within five days on the contested placement was ordered.

Parents of New York City handicapped children filed suit when their children were transferred from one private school to another over the parents' objections.[30] The parents argued that their children should be allowed to remain in the first school while the placement was contested. The defending school system responded that the change was due to alleged fiscal mismanagement uncovered following an audit of the original placement school. The court concluded that the change could not be seen as a "change in placement" triggering the EHCA due process proceedings, and that the plaintiffs had failed to present "evidence of injury capable of redress." In dismissing the action, the district court invited the parents to use administrative proceedings if they felt the new school was not meeting the educational needs of their children.

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[26] Armstrong v. Kline, 476 F. Supp. 583 (E.D. Pa. 1979). *See* THE YEARBOOK OF SCHOOL LAW 1980 (P. Piele, ed.) [hereinafter cited as YEARBOOK 1980] at 166-67.

[27] Sessions v. Livingston Parish School Bd., 501 F. Supp. 251 (M.D. La. 1980).

[28] Patsel v. District of Columbia Bd. of Educ., 522 F. Supp. 535 (D.D.C. 1981).

[29] *Id.* at 539.

[30] Dima v. Macchiarola, 513 F. Supp. 565 (E.D.N.Y. 1981).

Not all placement decisions are appealed by dissatisfied parents. A severely handicapped child missed two years of school when the Missouri commissioner of education appealed a decision made by a special hearing panel regarding her placement.[31] The commissioner wanted the child to receive her education at a state school, but the hearing panel disagreed and ordered the local school district to find an alternative placement. The appeals court could find no reason why the order of the panel should not stand.

Three 1981 cases raised questions concerning possible damages which might result from an improper educational placement. Courts in this area have generally held that Eleventh Amendment immunity claims are valid, though fees and orders to pay tuition are sometimes granted. One case raising these issues reached the Seventh Circuit Court of Appeals.[32] A Wisconsin district court had made a number of very specific rulings regarding the placement of an emotionally disturbed child, ordering staged transfer from a private school to a public school, and had awarded tuition plus standard costs to the plaintiffs because they had prevailed in most issues.[33] On appeal, the Seventh Circuit held that damages could be recovered only under "exceptional circumstances," which were not present in the case at hand. The appeals court concluded that neither EHCA nor the Civil Rights Act of 1871 entitled the parents to compensatory damages or attorney fees. Because EHCA did not specifically contain a section on damages, but did detail an elaborate process for contesting placement decisions, the court concluded that no right to damages could be constructed.

Eleventh Amendment issues were raised in an appeal of a Puerto Rico placement decision.[34] With a termination of EHCA funds to Puerto Rico in January 1979, provision of handicapped educational services to children on the island had been problematic. The plaintiffs were seeking payment of tuition for their daughter to attend school in Vermont, arguing that they had been unable to obtain adequate prior administrative review of their case. The First Circuit Court of Appeals discussed the implications of the plaintiffs' claim, concluding that

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[31] Mallory v. Drake, 616 S.W.2d 124 (Mo. Ct. App. 1981).

[32] Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981).

[33] Anderson v. Thompson, 495 F. Supp. 1256 (E.D. Wis. 1980). *See* YEARBOOK 1981 at 139, 237.

[34] Ezratty v. Commonwealth of Puerto Rico, 648 F.2d 770 (1st Cir. 1981).

EHCA did not amount to an "implied consent" to bring suit against the state. On the other hand, the appeals court noted that "the Eleventh Amendment does not affect the power of the state education department which is bound to uphold the provisions of EHCA."[35] In other words, an administrative review could result in an order to pay tuition. Thus, while the local education department was "primarily responsible" for failure to follow EHCA provisions, the case was remanded for further administrative proceedings. The court added that this review should occur "promptly and in good faith."

Finally, an Alabama district court considered the issue of damages in a case involving a severely retarded eighteen-year-old boy.[36] The court reviewed the program developed for the boy, who had a mental age of two and one-half years, and concluded that it was designed to "occupy his time" but did not maximize his acquisition of functional skills. The court ordered a specific training program, involving additional training for his teacher and for the local special education coordinator, as well as increased contact with nonhandicapped students. Schooling until the age of twenty-three was also required. Concluding that damages were not "capable of some reasonable determination," the court denied them. Attorney's fees totaling $36,700 were awarded, however.

4.1b Right to Education

In Colorado, the district court was asked to dismiss a variety of claims being raised under EHCA and the Rehabilitation Act of 1973. The defending state department of education claimed that it was not operating programs for handicapped children under EHCA, but rather was using funds under P.L. 89-313, the Elementary and Secondary Education Act of 1965. Therefore they argued that the less rigorous criteria for identifying and serving handicapped children, contained in P.L. 89-313, should apply in Colorado. Plaintiffs in this class action suit argued that the requirements of EHCA should be superimposed on those of the earlier act and that some handicapped children were not receiving any educational services at all—contrary to the Act's requirements. After weighing these conflicting arguments, the district court declined to dismiss the case, concluding that EHCA imposed the obligation on a state to serve all handicapped children.[37]

The New York commissioner of education sought to define a handicapped child as one with a discrepancy of 50 percent or more between expected achievement based on intellectual ability and actual achievement. In a companion administrative rule, the commissioner sought to remove all residential schools treating learning disabilities from the list approved for placement of children. In addition, all schools with a learning disabled population in excess of 2 percent of the district's total would be subjected to an annual state site visit. These actions were challenged for allegedly violating EHCA and the education law of New York.[38] The defendants raised a variety of procedural claims concerning the standing of the plaintiffs that were dismissed before the court turned to a discussion of the merits. Noting that the 50 percent rule would cause a decline by more than 50 percent of the number of learning disabled children in New York, the court concluded that the rule used an inflexible statistical measurement to reflect a much more complex phenomenon. The court observed that "[the rule] operates to eliminate consideration of factors and the use of techniques which do not, given the present state of the art, lend themselves to quantification."[39] In enjoining further use of the rule, the court observed that it had been considered and rejected by HEW at the time EHCA was promulgated.

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[35] *Id.* at 777.

[36] Campbell v. Talladega Cty. Bd. of Educ., 518 F. Supp. 47 (N.D. Ala. 1981).

[37] Association for Retarded Citizens in Colorado v. Frazier, 517 F. Supp. 105 (D. Colo. 1981).

The state tried to defend its proposed elimination of all residential treatment by arguing that this would further the desired goal of mainstreaming. The court disagreed, however, holding that the option of such treatment must remain to handle individual cases. As to the site visits, the plaintiffs argued that these would have a chilling effect on the willingness of school districts to declare their children as learning disabled. The state argued that the visits would prevent misclassification and it was this argument that the court accepted. The other two regulations were found to violate EHCA and the state was required to notify all school districts of the decision.

In another New York case involving the commissioner of education, action was brought seeking residential treatment for a neurologically damaged student. The school where placement was sought was not on the list of schools approved by the commissioner. Both the student's parents and the school district agreed on the placement, however. While action commenced, the student was enrolled in a public school program that all parties agreed was acceptable. Given this fact, and considering that administrative proceedings had not been exhausted, the court ordered the case dismissed and also denied a claim for tuition.[40]

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[38] Riley v. Ambach, 508 F. Supp. 1222 (E.D.N.Y. 1980).

[39] *Id.* at 1241.

[40] Lambardi v. Ambach, 522 F. Supp. 867 (E.D.N.Y. 1981).

A Massachusetts district court expanded the coverage of EHCA in that state, concluding that incarcerated juveniles had a right to special education services.[41] Part of the case also addressed the question of whether the counties or the state should pay for the services. In issuing an injunction, the court concluded that while some inmates were in the houses of correction for only short periods, they were still entitled to services. The court pointed to language in EHCA requiring that special education services be provided in "all such programs administered by any other state or local agency."[42] The state was ordered to submit a plan for resolving the question as to which unit would provide the service.

In a similar case, New Hampshire was ordered to provide educational services to school age children housed in its school for the mentally retarded.[43] A lengthy and depressing review of conditions at the school, detailing examples of inadequate facilities and mistreatment of residents, preceeded the lengthy list of holdings imposed by the court. The court concluded that the terms of both EHCA and § 504 had been violated. While community placement of the residents was not possible, some less restrictive environments were required. The court issued thirty-seven separate orders to accomplish that end. Some dealt with improvement of the facilities and others with educational matters. All residents between the ages of three and twenty-one were ordered to receive at least five and one-quarter hours of educational services per day, individual need plans, and other services. Parties involved in the case were ordered to submit plans for meeting the order by November 1982, and the court suggested that a special master might be appointed by the court if the order was not satisfied.

In cases reported in this section in prior years, the courts have held that handicapped students have the right to education in excess of 180 school days. This issue was also raised in a 1981 Georgia case. The plaintiffs argued that students lost academic and social skills during the long summer vacation, in violation of EHCA and § 504. They offered a variety of expert testimony to support their claims and the state responded. The court decided that the Georgia Board of Education did have an inflexible policy of never allowing educational services in excess of 180 days, by requiring local districts to pay all the cost for such services. This was found to violate the two federal acts. The court declined to find that students had been harmed by the policy, however.[44] Noting that there had been a "barrage of expert testimony" on both sides, the court concluded that "the evidence presented was not conclusive enough to justify the issuance of the mandatory injunction."[45] The court ordered that such placements be considered, noting that it might later be necessary for it to review the substantive content of individual educational programs. The "thorny problems" of financial limitations and overburdened school personnel were left for "a court or some other appropriate body in the future."

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[41] Green v. Johnson, 513 F. Supp. 965 (D. Mass. 1981).

[42] 20 U.S.C. § 1412(6).

[43] Garrity v. Gallen, 522 F. Supp. 171 (D.N.H. 1981).

[44] Georgia Ass'n of Retarded Citizens v. McDaniel, 511 F. Supp. 1263 (N.D. Ga. 1981).

In a case of a different sort from the others in this section, the father of a physically handicapped student of gifted intelligence brought suit alleging that his son's right to "a decent education" had been violated. The father wished his son to attend a high school different from the one to which he had been assigned. While the father had requested a preliminary injunction, the court rejected the request, determining that the case failed to present serious questions, that the student was already receiving "an appropriate education," and that there was no evidence that he would suffer irreparable harm from his current placement.[46]

4.1c Related Services

A Texas federal court issued an injunction providing a seven-year-old student with an air-conditioned classroom.[47] The student suffered from handicaps resulting from an automobile accident and was no longer able to function in environments which were not temperature controlled. School officials had provided the student with a portable, air-conditioned cubicle in which to sit during his elementary school class, but balked at cooling the whole classroom, arguing that it would be unfair for other classes. The court concluded that air conditioning was a "related service" and ordered it provided to the whole classroom so that the student could interact fully with other students and with his teacher.

The well-known "related service" case was further litigated in 1981. In 1979, a Texas federal district court ruled that a school district did not need to provide catheterization to an elementary school student suffering from spinal bifida.[48] The school district argued that such a procedure was medical in nature and not their responsibility. While the district court accepted this perspective, the Fifth Circuit Court of Appeals reversed, holding that catheterization was a "related service" required by EHCA to ensure that a handicapped child receive an education at school rather than at home.[49] The court of appeals also concluded that a failure to provide the service would violate § 504. The court remanded the question of damages and fees, which was the subject of the district court's action in 1981.[50]

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[45] *Id.* at 1276.

[46] Johnpoll v. Elias, 513 F. Supp. 430 (E.D.N.Y. 1980).

[47] Espino v. Besteiro, 520 F. Supp. 905 (S.D. Tex. 1981).

[48] Tatro v. State of Texas, 481 F. Supp. 1224 (N.D. Tex. 1979).

The student's parents requested damages including tuition, fees for the catheterization, and other charges. It was to the question of attorney's fees that the court devoted most of its attention. The court observed that EHCA, itself, did not provide for fees, but that fees might be awarded under "three possible theories." These include "appropriate relief under 20 U.S.C. § 1415(e)(2), under 42 U.S.C. §§ 1983 and 1988, and under 29 U.S.C. §§ 749a(b) and 505 because § 504 rights had been violated.[51] Each approach was arguable, but the court observed that the court of appeals had found that the parents had rights under § 504 and that this conveyed an "implied right to enforce them." The court ordered payment of $27,000 for attorney's fees and expenses.

4.1d Discipline

Courts in the past have generally held that handicapped students could not be suspended or expelled for certain offenses, as would children without handicaps, but that student placements could be altered. This issue was addressed by the Fifth Circuit Court of Appeals. A lower court had issued a preliminary injunction in the case of nine handicapped children who had been expelled and were out of school for two years. The students were mildly retarded, but no hearing had been held on the question of whether the students' misconduct was related to their condition. While the students received a *Goss*[52] due process hearing, it was not clear from the record whether they received a more thorough hearing, as required in cases of exclusionary discipline in excess of ten days.

In affirming the lower court ruling, the court of appeals concluded that expulsion represented a "change in placement" for the students, thus providing them certain procedural safeguards. The court also concluded that the students could not be expelled before experts considered the relationship between misbehavior and the students' handicaps.[53]

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[49] Tatro v. State of Texas, 625 F.2d 557 (5th Cir. 1980). *See* YEARBOOK 1981 at 143.

[50] Tatro v. State of Texas, 516 F. Supp. 968 (N.D. Tex. 1981).

[51] *Id.* at 981.

[52] Goss v. Lopez, 419 U.S. 565 (1975).

[53] S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981).

A Maryland district court rejected a request made by the mother of an emotionally disturbed child that he receive "an individualized disciplinary program" to accompany the educational plan prepared by his school.[54] The student had been involved in a long list of disciplinary rule infractions and had been suspended several times. Ultimately he was provided with home teaching by the system. While rejecting the request to order the disciplinary program, the district court did supervise an agreement between the parties that called for the creation of a new educational plan for the student, with the right of either party to administratively contest the aspects of the plan.

4.2 PUBLIC SCHOOL ASSIGNMENT, TUITION, AND TRANSPORTATION

4.2a Tuition and Assignment

Portions of the Texas education code prohibiting the use of state funds to educate "undocumented" migrant children continued to be the source of litigation in 1981. In 1980, the Fifth Circuit Court of Appeals had stayed a district court ruling which granted a request for a preliminary injunction requiring that the children be admitted to the public schools.[55] The Fifth Circuit order was in turn overruled by Supreme Court Justice Lewis Powell sitting as Circuit Justice.[56] The Supreme Court should hear the case in 1982. The original litigation was directed at the Tyler, Texas, school district, which had required $1,000 per-year tuition to educate each child unlawfully present in the district.

In 1981, the Fifth Circuit court reviewed a case involving the presence of undocumented alien children in Dallas.[57] The district court had issued an injunction ordering the children admitted and the appeals court affirmed, following the precedent of its decision in 1980.[58] It was clear, however, that two of the three court of appeals judges disagreed with their court's earlier decision, though they were powerless to reverse it absent a Supreme Court ruling or a ruling of the appeals court sitting *en banc*. While affirming the lower court, the two judges nevertheless argued that the State of Texas "could reasonably have concluded that it should not dilute its limited resources by providing free public education to illegal alien children, who can never—absent some form of amnesty—become citizens...."[59]

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[54] Pratt v. Board of Educ. of Frederick Cty., 501 F. Supp. 232 (D. Md. 1980).
[55] Doe v. Plyler, 628 F.2d 448 (5th Cir. 1980); 458 F. Supp. 569 (E.D. Tex. 1979).
[56] Certain Named and Unnamed Non-Citizens v. Texas, 448 U.S. 1327 (1980).
[57] Boe v. Wright, 648 F.2d 432 (5th Cir. 1981).
[58] Doe v. Plyler, 628 F.2d 448 (5th Cir. 1980).

A California appeals court rejected the educational claim of a child present in the United States on a tourist visa.[60] A lower court had granted a preliminary injunction ordering the child admitted to the Glendale public school system, but the court of appeal reversed. The child's parents had arrived in the United States on tourist visas but had then purchased a home and sought to have their child educated at public expense. The court concluded that all persons using such visas by definition maintained legal residence elsewhere.

The Fifth Circuit Court of Appeals heard a case challenging the constitutionality of a Texas residency law.[61] The challenged statute requires a student living apart from parents or guardians to prove "that his presence in the school district is not for the primary purpose of attending the public free schools."[62] The district court had ruled that the law requiring tuition was valid because it contained no durational requirement and did not create an irrebutable presumption that any move was for the purpose of attending school.[63] The appellants, on the other hand, argued that the statute discriminated against Mexican-Americans. The court of appeals rejected this argument and upheld the lower court, noting that any student who, for health or other reasons, was forced to live apart from parents or guardians would not be forced to pay the charges. Therefore the statute satisfied the Supreme Court precedent on residence and tuition, which requires that no irrebutable presumption that the student moved for educational purposes be created.[64]

A Georgia district court considered the question of whether or not a student who had moved into a house with her boyfriend could continue to attend high school. The school district argued that the living arrangement did not allow the student to meet the state's "resident student" definition and that the unconventional living arrangement would provide a bad example for other students if the student were allowed to attend school. The district court concluded, "not without some hesitation," however, that the student was entitled to a preliminary injunction to attend school. The court ruled, based on the student's self-support, that she was an "emancipated minor," and, while unmarried, would suffer a loss of equal protection rights if she were not admitted to school.[65]

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[59] Boe v. Wright, 648 F.2d 432 (5th Cir. 1981) at 436.

[60] Anselmo v. Glendale Unified School Dist., 177 Cal. Rptr. 427 (Cal. Ct. App. 1981).

[61] Arredondo v. Brockette, 648 F.2d 425 (5th Cir. 1981).

[62] *Id.* at 427.

[63] Arredondo v. Brockette, 482 F. Supp. 212 (S.D. Tex. 1979). *See* YEARBOOK 1981 at 145.

[64] Vlandis v. Kline, 412 U.S. 441 (1973).

More conventional assignment cases argue the question of whether or not children were appropriately reassigned from one school to another by their school board. The Supreme Court of Arkansas faced the issue of the reassignment of thirty-one students following the closing of a school. The students had been welcomed at their new school and the county board of education had approved the transfer. The school district that lost the enrollment challenged the transfer, however. The court concluded that consent of the "sending district" was required before the transfer could take place and voided the move. Two justices dissented from the majority's interpretation of the Arkansas statute, arguing that the "sender" in the case was the county board that had approved the transfer, not the individual school that opposed it.[66]

A Missouri school district voted to close one of two facilities it operated for seventh and eighth grade students, and parents protested. The new facility for the transferred students was located twenty-three miles from their old school. A state appeals court concluded that the plaintiffs failed to present any "genuine issues" in their complaint and that the added cost of transferring the students was not enough to show that the school board had been arbitrary or capricious in its decision.[67]

Another Missouri appeals court heard a complaint from a local school involving the reassignment of five of its pupils to a school 15 miles closer to their homes. The decision made by the county board of education was challenged by the school which had lost the students. The court concluded that the school to which the students had been transferred was more "accessible" under the terms of the applicable state statute and noted that the county board did not have to discuss the holdings of recent court cases for its decision to stand, as was suggested by the appellants.[68]

Petitioners challenged the decision made by the New York City Board of Education to close a school in Queens, New York. The chancellor of the New York system made the decision to promote racial integration and because double-sessions would no longer be required at the unified school. The appellants argued that the transfer decision, coming at mid-point in the school year, was "educationally unsound."

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[65] Street v. Cobb Cty. School Dist., 520 F. Supp. 1170 (N.D. Ga. 1981).

[66] Cord-Charlote School Dist. No. 8 v. Independence Cty. Bd. of Educ., 608 S.W.2d 12 (Ark. 1980).

[67] Bronestine v. Geisendorfer, 613 S.W.2d 465 (Mo. Ct. App. 1981).

[68] State *ex rel.* Viburnum v. Iron Cty. Bd. of Educ., 615 S.W.2d 656 (Mo. Ct. App. 1981).

The court on first impression refused to hear the case, leaving the appellants with the option of an administrative appeal to the state commissioner of education on the question of the educational merits of the closing. The appeals court affirmed the lower court, holding that the closing did not raise questions "traditionally cognizable" by the courts.[69]

Indiana has a system whereby student transfers are approved by a state commission on education. That commission granted twenty-four student transfers over the objections of their school district, and the district filed suit. A lower court reversed the commission's decision and the commission appealed. The appeals court noted the statutory standards for transfers, such as student travel time, had been considered and stated that judicial intervention would be possible only if the commission exceeded its powers or acted on insufficient evidence. The court concluded that the commission had acted properly in this instance and reversed the lower court.[70]

In an interesting case involving a special fee, an Illinois appeals court considered whether parents could be charged for their child's lunchroom supervisor. The DuPage County school board levied the fee of $15 each term to be paid by all students living 0.7 mile from the school, or less, who wished to have lunch in the school cafeteria. Students living at a distance greater than the limit, for whom a walk home for lunch was more difficult, were not charged the fee. The fee proceeds were used to hire para-professional lunchroom supervisors. Parents filing the suit claimed that it violated the Illinois constitutional requirement of a "free education," while the system replied that there was nothing educational about the optional lunch program. A divided appeals court approved the fee, accepting the argument that lunch was separate from the rest of the school day. A dissenting judge disagreed, concluding that helping children get along with one another was "instructional" under the terms of the Illinois constitution.[71]

4.2b Transportation

Transportation cases generally involve disputes between parents and school authorities over where children should be picked up by school buses or whether children living in remote areas should receive the service at all. Several cases fitting this description were heard in 1981. In addition, cases involving reduced bus service were filed in localities where financially-pressed districts attempted to save scarce resources by reducing student transportation. Finally, a New Hampshire district court upheld a school board policy of suspending bus service on routes where student disorders on school buses were recorded.

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[69] Board of Educ. of Commun. School Dist. No. 29 v. Board of Educ. of City of N.Y., 435 N.Y.S.2d 759 (N.Y. App. Div. 1981).

[70] Commission on General Educ. v. Union Twp. School of Fulton Cty., 419 N.E.2d 181 (Ind. App. Ct. 1981).

[71] Ambroiggio v. Board of Educ., 427 N.E.2d 1027 (Ill. App. Ct. 1981).

The New Hampshire case was filed by parents who argued that their children were being unjustly punished when the five-day suspension of bus service took place. There were twelve suspensions of bus service among the 150 routes under the supervision of the Nashua, New Hampshire board. The suspensions were for such acts as slashing bus seats and other disorders and were handed out after the parents of all passengers on the routes had received advance notice that they would occur unless students involved in the acts admitted their participation. The plaintiffs argued that their children had no involvement in the disorders. After concluding that the service was a protected property right, the court next addressed the question of whether the harm suffered by the students outweighed the interest of the school board in enacting policies to ensure the safety of students on school buses. The court concluded that, while the policy punished the innocent as well as the guilty, the school board did not exceed its authority and the substantive and procedural arguments advanced by the plaintiffs were rejected.[72]

A Pennsylvania school system was sued for providing one-way bus service for kindergarten children. The district sponsored half-day kindergarten sessions, but provided bus service only to school in the morning and from school in the afternoon. Parents filed suit arguing that the policy discriminated against children from homes where family income did not permit parents to provide for half the transportation cost. The court accepted this argument, holding that the policy created a "suspect classification" based on wealth, depriving the plaintiffs of their equal protection rights.[73]

Parents of nonresident students attending the District of Columbia public schools challenged the district's policy of providing reduced public transportation fares only for students living in the district. A federal court affirmed the policy and the parents appealed. The parents argued that the policy, which charged nonresidents fifty cents instead of a dime, violated the Fourteenth Amendment. The District of Columbia Court of Appeals rejected the claim and affirmed the lower court, concluding that there was a rational basis for a policy that provided the reduced-cost transportation only within the jurisdiction whose citizens helped pay for the service with local taxes.[74]

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[72] Rose v. Nashua Bd. of Educ., 506 F. Supp. 1366 (D.N.H. 1981).

[73] Shaffer v. Board of School Directors, 522 F. Supp. 1138 (W.D. Pa. 1981).

[74] Fenster v. Schneider, 636 F.2d 765 (D.C. Cir. 1980).

School district lines were also the determining factor in a New York case involving free provision of bus service to students attending "open enrollment" schools. Students attending the schools received free bus service until the 1980-81 school year when budgetary restraints caused the district to cancel the free transportation policy for the students. Parents of the students alleged that the district should provide the bus service since they did so for students attending neighborhood schools. The appeals court ruled that all students "in like circumstances" were being treated equally and rejected the parents' claim.[75]

Four cases involved disputes concerning the transportation of individual students. In one, a New York school district was obligated to provide service up to fifteen miles but the plaintiff's daughter resided 15.1 miles from the school.[76] Because the school district had previously provided bus service to a property adjacent to the student's home, within the statutory limit, the district was ordered to continue the policy. In the second case, a decision by an Illinois school system on the "safest" bus pick-up point was upheld as reasonable over competing claims by parents that the more safe alternative was the plaintiff's driveway.[77] A Pennsylvania court likewise rejected claims by parents that bus service should be provided within a private residential development, rather than at its entrance.[78] Finally, the Supreme Court of Oklahoma upheld a lower court decision that a school district need not provide transportation over a four-and-a-half-mile-long forest service road.[79] The lower court judge had personally inspected the route in question and had found it dangerous.

4.2c Compulsory Attendance

Parents seek to avoid sending their children to school for a variety of reasons. Ohio parents of an elementary school student enrolled their daughter in a one-room Amish school, though they were not members of the Amish faith. The parents were convicted of violating the Ohio compulsory attendance law because the school did not conform to the minimum curricular standards proscribed by the Ohio State Board of Education. The appeals court affirmed and the parents sought relief from the Supreme Court of Ohio. The court rejected the parents' procedural claims and focused on their religious freedom arguments and the role of the Ohio board in attendance matters.[80]

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[75] Hatch v. Board of Educ., Ithaca City School Dist., 439 N.Y.S.2d 466 (N.Y. App. Div. 1981).

[76] Gundrum v. Ambach, 422 N.Y.S.2d 661 (N.Y. App. Div. 1981).

[77] Posteher v. Pana Commun. Unit School, 421 N.E.2d 1049 (Ill. App. Ct. 1981).

[78] Abrahams v. Wallenpaupack Area School Dist., 422 A.2d 1201 (Pa. Commw. Ct. 1980).

[79] Davis v. School Dist. No. D-14, 625 P.2d 630 (Okla. 1981).

While they were not Amish, the parents espoused a set of fundamentalist religious beliefs. The father stated that he believed that the curriculum of the public schools would expose their daughter to "things I believe a Christian should not participate in."[81] The parents indicated that they had moved to the vicinity of the Amish school so that their daughter could attend school there, stating that the program there came close to being one which their religious principles would support. Applying the doctrines present in *Yoder*,[82] The Ohio court concluded that the parents' beliefs were sincerely held and that their religious rights would be violated if the state forced attendance elsewhere. The court also ruled that the state's minimum standards were overbroad.

Similar issues were confronted in a case heard by the Iowa Supreme Court. Parents of two children were convicted for failure to send the children to school. While the parents did not present evidence on how the attendance law violated their First Amendment rights, they did claim that the statute requiring them to provide "an equivalent education by certified teachers" was overly broad and denied them their religious freedom. The court disagreed, ruling that there was nothing on the record which would indicate that any constitutional right had been violated.[83]

The practice of an Illinois county judge in jailing truant students for contempt of court was appealed in two separate cases. The students were placed on probation for being in need of supervision and were jailed the next time they missed school. In the first case, the appeals court overruled the jail sentence on the ground that the student had not been warned of the consequences associated with the admission that she had skipped school.[84] The appeals court warned at that time that contempt could not be employed to jail minors for truancy. The judge ignored that admonition and sentenced a second youth to a sixty day sentence.[85] The appeals court rejected this "second attempt to erect a parallel system of juvenile justice," holding that criminal charges could be brought only against parents for their child's failure to attend school, not against the minor child. Further, the court concluded that punitive action against the truant can be brought only after other resources have first been provided and have failed.

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[80] State *ex rel.* Nagle v. Olin, 415 N.E.2d 279 (Ohio 1980).

[81] *Id.* at 282.

[82] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[83] State of Iowa v. Moorhead, 308 N.W.2d 60 (Iowa 1981).

[84] *In re* T.V.P., 414 N.E.2d 209 (Ill. App. Ct. 1980).

[85] *In re* K.S.Y., 416 N.E.2d 736 (Ill. App. Ct. 1981).

4.3 BILINGUAL-BICULTURAL PROGRAMS

In a case drawing heavily on a decade of desegregation litigation, a federal district judge ordered a massive bilingual education program for Hispanic children residing in Texas.[86] The roots of the current decision reach back to 1970, when the existence of state-supported segregation was first demonstrated.[87] Later cases affirmed the presence of *de jure* segregation directed at Mexican-American children in Texas.[88] In the 1981 case, the court concluded that Mexican-American children had been relegated to "Mexican schools," had been provided with "vastly inferior" educational programs, and had been denied their native language and culture in an attempt to "Americanize them."[89] The court went on to detail the deficiencies in their educational programs suffered by the Mexican-American children and to characterize the remedial offerings designed to address these problems as "wholly inadequate." Of particular concern was the practice of forcing Spanish-speaking children into classrooms where instruction in English took place before the children could understand the language. The court concluded by ordering the parties in the case to fashion specific remedies for correcting the deficiencies which the court observed.

The court also was specific in ordering sweeping changes for the Texas bilingual program. First, it ordered staged introduction of bilingual education for all Mexican-American children in the state, over a six-year period. Second, testing was ordered to determine educational proficiency. Comprehensive "exit criteria" were ordered for children being transferred from classes where Spanish instruction occurred and various state monitoring devices were required. The court argued that, taken together, the steps would help ensure that Mexican-American children would not "remain educationally crippled for life, denied the equal opportunity which most Americans take for granted."[90]

A few months later the State of Texas filed a variety of procedural objections in response to the district court's order.[91] The district court refused to let the state withdraw evidentiary stipulations to which it had agreed as part of the earlier proceedings and would not allow additional pleadings on the constitutional issues discussed in the first of its

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[86] United States v. State of Texas, 506 F. Supp. 405 (E.D. Tex. 1981).

[87] United States v. State of Texas, 321 F. Supp. 1043 (E.D. Tex. 1970); *aff'd*, 447 F.2d 441 (5th Cir. 1971); *cert. denied*, 404 U.S. 1016 (1972).

[88] United States v. Texas Educ. Agency, 564 F.2d 162 (5th Cir. 1977); *cert. denied*, 443 U.S. 915 (1979). *See* YEARBOOK 1980 at 227.

[89] United States v. State of Texas, 506 F. Supp. 405 (E.D. Tex. 1981) at 414.

[90] *Id.* at 441.

[91] United States v. State of Texas, 523 F. Supp. 703 (E.D. Tex. 1981).

1981 opinions. In addition, the court refused to agree that its order was impossible to carry out, that they had inadequate time, and that every school district of the state should be added as parties to the case. The court also refused to stay its order pending an appeal by the defendants.

In another difficult Texas case, the Fifth Circuit Court of Appeals considered the adequacy of bilingual education in the Raymondville Independent School District.[92] The lower court had ruled in favor of the defending school system and the plaintiffs appealed, alleging that the school district used ability grouping to segregate classrooms and that the bilingual programs offered in the school violated Title VI of the 1964 Civil Rights Act. The court of appeals concluded, however, that the record was inadequate to support or to deny these claims and the case was remanded. The court could not determine, for example, whether or not the district had been guilty of past discrimination. This made it impossible to address the ability grouping question. The court was also persuaded that the district court should consider whether or not the teachers of the school district suffered from language deficiencies and ordered a hearing on that question as well. Student language tests were also ordered. The court did rule, however, that the district's program did not violate Title VI.

Both parties in a Montana bilingual-bicultural case filed motions for summary judgment.[93] Plaintiffs in the case were Blackfoot Indians who requested a bilingual-bicultural program, contending their rights had been violated under Title VI. The court concluded that the students had no constitutional right to such a program, but at the same time agreed that arguments on the students' English language deficiencies needed to be heard to determine if they were receiving a program to "overcome language barriers" as required by Title VI. The motions from both parties for a summary judgment were therefore denied, and the court asked for evidence on the nature of the school district's language remediation programs. At the same time, the court suggested that the parties might wish to work together to agree on language programs which might meet the students' needs.

4.4 PRIVATE AND PAROCHIAL SCHOOLS

Only three cases were litigated last year concerning pupils' rights in private and parochial schools. Usually, there are several cases concerning state funding and transportation of private school students, but last year only one such case arose. The other two cases concerned a parochial school which was enjoined from operating for failing to comply with state school laws and an expulsion of a student from a parochial school.

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[92] Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981).

[93] Heavy Runner v. Bremner, 522 F. Supp. 162 (D. Mont. 1981).

The district court for Rhode Island found a state statute authorizing public busing of students to private and parochial schools to be constitutionally flawed.[94] The case was very similar to a 1977 case of the same name.[95] The statute that had been struck down in 1977 by the district court had been subsequently modified. The same plaintiffs had again sought relief from the new statute. The court applied the three-pronged test established in *Lemon v. Kurtzman.*[96] To pass this test a statute must (1) have a secular purpose, (2) neither advance nor inhibit religion, and (3) not create excessive entanglement between state and religion.

The court held, as it did in 1977, that the statute did have the secular purpose of providing safe transportation of all children to school. However, the modification of the statute still failed to enable it to pass the second and third prongs of the test. The court found that the statute advanced religion because it gave options to nonpublic school students which were not available to public school students. Thus it was not neutral in its effect on religion. The court also held that the statute created excessive entanglement between church and state in that interaction was necessary for proper scheduling and routing of buses, for necessary adjustments for holidays or special events, and for dealing with discipline problems that occurred on school buses. Consequently, the statute was found unconstitutional and the plaintiffs were granted an injunction.

In a quite different case, the Supreme Court of Nebraska affirmed a lower court decision to enjoin the operation of a parochial elementary and secondary school for noncompliance with state education laws.[97] The school in question refused to seek approval from the State of Nebraska to operate. The school claimed that it was a tenet of its religion to educate its students and that the state had no authority to approve or accredit the school. By not seeking approval of the school, it violated the state's compulsory attendance laws. The court decided that the school's refusal was an arbitrary and unreasonable attempt to thwart the state's "compelling interest" to educate its citizens.

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[94] Members of the Jamestown School Comm. v. Schmidt, 525 F. Supp. 1045 (D.R.I. 1981).

[95] Members of the Jamestown School Comm. v. Schmidt, 427 F. Supp. 1338 (D.R.I. 1977). *See* YEARBOOK OF SCHOOL LAW 1978 (P. Piele, ed.) [hereinafter cited as YEARBOOK 1978] at 49.

[96] 403 U.S. 602 (1971).

[97] State v. Faith Baptist Church of Louisville, 301 N.W.2d 571 (Neb. 1981).

Finally, an Illinois appeals court found that a child who had been expelled from a parochial school did not have a contractual right to be reinstated.[98] The court held that the relationship between a school and a student is a highly personal one involving personal services. Therefore, the court found that a proper remedy for breach of contract would be action for money damages rather than reinstatement. Since Illinois law allows for monetary damages for a private school's wrongful expulsion of a student in violation of a contract, the case was remanded for further proceedings concerning monetary damages.

4.5 SCHOOL SPORTS

Transfer rules brought the most litigation last year for state athletic and activities associations. Courts usually found that a rational relationship existed between the rule and the legitimate state interest of stopping athletic recruiting. Students lost their challenges in all but one of the cases brought before various courts. Only the Supreme Court of Texas found that a transfer rule failed the rational relationship test and it was held unconstitutional on several grounds. Female students charging sex discrimination suffered several defeats last year. For the first time in several years, there were no cases brought by male students seeking to compete on girls' teams.

4.5a State Athletic and Activities Associations

A New York state appeals court decided that the suspension of a high school gymnast by the New York State Public High School Athletic Association for violating one of its rules was well within the power of the association. The rule at issue stated that a student loses his or her eligibility to participate in association competition for the rest of the season if the student participates in athletic competition not sponsored by the association. This rule applied only to a specific list of sports, including gymnastics. When the student participated in a gymnastics meet in another state, he was suspended for the rest of the season. The student brought suit, arguing, among other things, (1) that the association lacked jurisdiction over an individual's participation in an event in another state, and (2) that the imposition of the rule violated the Equal Protection and Due Process Clauses of the United States Constitution.

In rejecting these arguments, the court stated that the jurisdictional argument was without merit because the student wished to participate in the association's program and therefore came under their jurisdiction. The claim that he was not afforded due process was dismissed because participation in athletics is "frivolous and not substantial," therefore triggering no constitutional claims. In addition, the appeals court held that imposition of the rule involved no discretion on the association's part. Finally, the court decided there was no denial of equal protection since the rule was reasonably related to a legitimate state interest.[99]

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[98] Block v. Hillel Torah North Suburban Day School, 426 N.E.2d 976 (Ill. App. Ct. 1981).

In another case involving a ruling of ineligibility, a federal district court decided that the Texas University Interscholastic League appropriately enforced a rule which made nineteen-year-old students ineligible for athletic competition. The rule states that "a person who has reached his 19th birthday on or before the first day of September preceding the contest shall not participate in any League contest." Violation of this rule resulted in a minimum penalty of forfeiting the game in which the nineteen-year-old student participated. The court ruled that making the nineteen-year-old student ineligible and assessing the minimum penalty to the school (which resulted in the loss of a berth in the football playoffs) did not violate anyone's Fourteenth Amendment rights because participation in athletics is not a fundamental right. Therefore, since the rule was reasonably related to the legitimate state of interest of assuring fair competition, the rule as not constitutionally flawed. Also, the court ruled that participation in playoffs (where college scouts would be watching) amounts to a "mere expectation" of property rather than a constitutionally protected claim of entitlement. The students had no property interest in participating in athletics and/or football playoffs.[100]

Several 1981 cases involved athletic association transfer rules. The United States Supreme Court denied certiorari in a case concerning a rule of the Louisiana High School Athletic Association.[101] The Fifth Circuit Court of Appeals had reversed the district court's decision that the rule unconstitutionally denied equal protection.[102] The appeals court found that the rule was rationally related to a legitimate state interest. The transfer rule stated that upon completion of elementary or junior high school, a student was eligible for interscholastic athletic competition only at the high school within his or her home district. The plaintiffs came under the rule when transferring from elementary and junior high schools of the Lutheran Church Missouri Synod to the church's only high school in the area because the high school was not in any of the home districts of the elementary and junior high school.

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[99] Caso v. New York State Pub. High School Athletic Ass'n, 434 N.Y.S.2d 60 (N.Y. App. Div. 1980).

[100] Blue v. University Interscholastic League, 503 F. Supp. 1030 (N.D. Tex. 1980).

[101] Walsh v. Louisiana High School Athletic Ass'n, 449 U.S. 1124 (1981).

[102] Walsh v. Louisiana High School Athletic Ass'n, 428 F. Supp. 1261 (E.D. La. 1977), 616 F.2d 152 (5th Cir. 1980). *See* YEARBOOK 1981 at 153.

In Texas, a student violated the transfer rule by having participated on a high school basketball team in Vermont. He had moved to Texas when his father was transferred there by his employer. For violating the rule, the student was ruled ineligible to play for one year. The Texas Supreme Court reasoned that the transfer rule created two classes of students: those who transfer to another school and those who don't. The students who transferred were discriminated against. Therefore, the question was whether this denial of equal protection was rationally related to a legitimate state interest. The court held that it was not, because the rule did not operate "rationally to deter recruitment" of student athletes, the reason given for imposing transfer rules. In addition to the equal protection ruling, the court held that the transfer rule infringed on the student's fundamental rights of familial privacy and interstate travel.[103]

In contrast to this major break with the traditional decisions on transfer rules, a federal district court in Missouri found that a Missouri State High School Activities Association transfer rule did not violate a student's equal protection right.[104] The student in the case had transferred from an association member school where she had participated in athletic competition to another member school where she was ruled ineligible to compete for one year. The facts showed clearly that no "recruiting" had taken place. The student argued that since the transfer rule applied to athletics and not to other forms of extracurricular activity, such as debate, speech, and music, she as an athlete was being discriminated against in violation of her equal protection rights. The court held that historical data showed that there was no need for such a strict rule for nonathletic activities and besides the transfer rule did provide for causing students who had been "recruited" from other schools for a nonathletic activity to be made ineligible. The fact that the transfer rule was rationally related to the legitimate state interest of stopping recruiting was sufficient to hold that the transfer rule is constitutional.

Similarly, the Court of Appeals of Oregon upheld the Oregon School Activities Association's (OSSAA) transfer rule in two separate cases. In the first, two students had transferred from a parochial to a public high school.[105] Therefore, they fell under the association's transfer rule and were made ineligible for one year. The students argued that the rule violated their right to free exercise of religion and denied them equal

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103. Sullivan v. University Interscholastic League, 599 S.W.2d 860 (Tex. Civ. App. 1980); 616 S.W.2d 170 (Tex. 1981).

104. Barnhorst v. Missouri State High School Activities Ass'n, 504 F. Supp. 499 (W.D. Mo. 1980).

105. Whipple v. Oregon School Activities Ass'n, 629 P.2d 384 (Or. Ct. App. 1981).

protection. The court rejected the first argument, holding that the burden placed on the student's religious freedom was both "limited in scope and insignificant in magnitude" and thus was constitutionally permissible. On the second argument, the court held that even though the transfer rule contained certain exceptions, such as transfers back to the student's home district, and transfers from boarding schools, the transfer rule still had a rational relationship to the prevention of athletic recruiting. Because the rule might be "overbroad" was not sufficient to make it unconstitutional.

The second Oregon case on the OSSAA transfer rule brought forth two more issues in addition to the equal protection argument. The student in the case argued that the rule violated both her procedural and substantive due process rights. The court quickly dispensed with the substantive due process claim by stating that since no privacy rights or family relations were involved, the court could not find the OSSAA rule constitutionally flawed. The United States Supreme Court has only allowed substantive due process claims in the area of privacy rights and family relations. As for the procedural due process argument, the court noted that students do not have a property interest in athletics.[106]

The First Circuit Court of Appeals also ruled on a transfer rule case last year. Four students in Rhode Island "voluntarily" transferred to another high school by obtaining guardians in the school district so they could change their legal addresses. This violated the Rhode Island Interscholastic League's transfer rule and the students were suspended from playing on the school's hockey team. The court rejected the student's equal protection and due process claims.[107]

A state court of Pennsylvania ruled that the Pennsylvania Interscholastic Athletic Association (PIAA) was within its power when it ordered a high school football team to forfeit three victories. The football team had used a player who was academically ineligible under PIAA rules. The school claimed that the player had no appreciable affect on any of the games and that the forfeiture had caused the team to be ineligible for the playoffs, robbing athletes of a "property interest" without due process of the law. The court cited the rulings of many other jurisdictions in holding that students have no "property interest" in athletics. The possibility of receiving an athletic scholarship did not give students a constitutionally protected property interest. Therefore, the athletes had no right to due process.[108]

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[106] Cooper v. Oregon School Activities Ass'n, 629 P.2d 386 (Or. Ct. App. 1981).

[107] Hebert v. Ventetuolo, 638 F.2d 5 (1st Cir. 1981).

[108] Adamek v. Pennsylvania Interscholastic Athletic Ass'n, 426 A.2d 1206 (Pa. Commw. Ct. 1981).

The Fifth Circuit Court of Appeals reversed a district court's finding that an athletic association's summer camp rule was unconstitutional.[109] At issue was a Texas University Interscholastic League (UIL) rule which suspended any student who attended football or basketball summer training camps from eligibility in varsity athletics for one year. The district court held that the rule infringed on the student and parent's constitutional right to family privacy.[110] The appeals court, however, concluded that parents do not possess a constitutional right to send their children to summer athletic camps and that children do not possess a constitutional right to attend such camps. Further, the court found that a rational basis for the UIL rule existed in the league's interest in achieving a competitive balance between those students who could afford to attend such camps and those who could not, and in avoiding excessive pressures on students to attend the camps. Finally, since the rule had a rational basis and no fundamental right was at stake, the appeals court held that the rule did not violate the equal protection clause even though it did discriminate against that class of students which attended the summer training camps.

The Eighth Circuit Court of Appeals affirmed a district court's decision that the Arkansas Activities Association's (AAA) rule limiting membership to only those schools which had state accreditation was not constitutionally flawed.[111] The case involved a Baptist school which had obtained membership in the AAA for the school years 1978-79 and 1979-80, with the latter year's membership given on the condition that the school seek state accreditation. The school accepted the condition at first and then decided not to seek accreditation. They argued the accreditation would violate a tenet of their religion. Consequently, when the AAA sought to exclude the school from membership, the plaintiff argued the school was being unconstitutionally penalized for practice of its religious beliefs. The appeals court disagreed. The court held that the Constitution does "not forbid reasonable nondiscriminatory regulation designed to advance recognized secular interests, such as the quality of instruction."[112] The state, through the AAA, had a legitimate right to regulate membership on the basis of state accreditation of the school. Because the plaintiffs could not show that participation in interscholastic activities was a tenet of their religion, the state was not denying them the free exercise of their religion, but simply applying "a reasonable regulation of education, based on neutral, secular principals and purposes."[113]

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[109] Kite v. Marshall, 661 F.2d 1027 (5th Cir. 1981).

[110] Kite v. Marshall, 494 F. Supp. 227 (S.D. Tex. 1980). *See* YEARBOOK 1981 at 156-157.

[111] Windsor Park Baptist Church v. Arkansas Activities Ass'n, 658 F.2d 618 (8th Cir. 1981).

[112] *Id.* at 621.

In another membership case, the Supreme Court of New Jersey decided that the Northern New Jersey Interscholastic League (NNJISL) could constitutionally exclude nonpublic schools from membership.[114]

4.5b Sex Discrimination

Last year was not a year for supporters of mixed-gender athletic teams as both the Sixth and Seventh Circuits allowed schools to establish separate but equal athletic programs. However, the Sixth Circuit did expressly allow schools the discretion of whether they should allow mixed-gender athletic teams in contact sports.

The Sixth Circuit Court of Appeals found that an Ohio High School Athletic Association (OHSAA) rule violated Title IX and that the association was to be enjoined from enforcing it.[115] The case involved a local school board which wished to establish a mixed-gender middle school basketball team. However, it was prohibited from doing so by a OHSAA rule. Fearing that it would lose federal aid for violating Title IX, the school board sued OHSAA and the state board of education. The state board was enjoined because it was alleged that it encouraged or at least failed to discourage sex discrimination in athletics by supporting the OHSAA rule.

The district court held that the state board was a proper party to be enjoined along with OHSAA and that not only was the OHSAA rule unconstitutional but a regulation of Title IX was also unconstitutional for prohibiting mixed-gender athletic teams in contact sports.[116] The appeals court disagreed with the analysis of the district court. First, the appellate court held that the issue of the state board's actions was to be remanded to permit the plaintiff school board to show that the state board had intentionally supported discriminatory practices by local school boards. Secondly, where the district court had found no difference between the Title IX regulation and the OHSAA rule, the circuit court of appeals found that there was a difference. The court concluded that the federal regulation permitted mixed-gender teams, leaving the discretion of whether to employ such a program to the local school boards, even though the OHSAA rule expressly prohibited mixed-gender teams in contact sports. Therefore, where the district court found the OHSAA rule unconstitutional because it mirrored the Title IX regulation that the district court had found unconstitutional, the court found the OHSAA rule illegal because it violated the Title IX regulation. The circuit court reversed the district court ruling that the Title IX regulation was unconstitutional because it felt the issue of constitutionality should not be addressed in this case.

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[113] *Id.* at 619.

[114] Christian Brothers Inst. of New Jersey v. Northern New Jersey Interscholastic League, 432 A.2d 26 (N.J. 1981).

[115] Yellow Springs Exempted Village School Dist. Bd. of Educ. v. Ohio High School Athletic Ass'n, 647 F.2d 651 (6th Cir. 1981).

[116] Yellow Springs Exempted Village School Dist. Bd. of Educ. v. Ohio High School Athletic Ass'n, 443 F. Supp. 753 (S.D. Ohio 1978). *See* THE YEARBOOK OF SCHOOL LAW 1979 (P. Piele, ed.) [hereinafter cited as YEARBOOK 1979] at 267-68.

Finally, the court ruled that discretion as to whether a school system should establish separate but equal programs or mixed-gender programs was to be delegated to the local school boards and not the OHSAA. The court recognized that it would be the local school system which would suffer from noncompliance with Title IX (through loss of federal aid) and not the OHSAA. Therefore, the local school board should decide how best to comply with Title IX. The circuit court noted that some schools might decide that under the circumstances a separate but equal program would best comply with Title IX, while other school systems might choose a mixed-gender program.

The Seventh Circuit Court of Appeals holding last year that a Chicago school system's "separate but equal" athletics program was not constitutionally flawed was left standing when the United States Supreme Court denied certiorari.[117] The female student in the case wished to play on the boys' sixth-grade basketball team. The facts showed that she was an exceptional athlete who was rated at about the eighth-grade boys basketball level. The lower court ruled in the student's favor. It applied strict scrutiny standards because, in its opinion, she was being denied the fundamental "right to develop" and the fundamental "right to an education." The court of appeals, however, noted that the Supreme Court had not made either of these "rights" fundamental. Therefore, it did not apply strict scrutiny in the case. The circuit court agreed with the review of the case by Supreme Court Justice Paul Stevens sitting as circuit judge, who stated, "If the classification is reasonable in substantially all of its applications, I do not believe that the general rule can be said to be unconstitutional simply because it appears arbitrary in an individual case."[118] The circuit court felt that the school's program substantially served the objective of increasing girls' participation in athletics. Allowing coeducational competition could cause most females to be excluded from athletics. Therefore, the program was rationally related to a legitimate state interest.

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[117] O'Connor v. Board of Educ. of School Dist. No. 23, 645 F.2d 578 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 641 (1981).

[118] O'Connor v. Board of Educ., 101 S. Ct. 72, 75 (1980).

In another setback for girls seeking admission to athletic programs provided for boys, a federal district court in Michigan ruled that it could not reach Title IX claims made in the case because the athletic program did not directly receive federal funds. The student claimed that she had been cut from the school's only golf team because she was a female. She asked for restoration of her team membership or a "separate but equal" girls' team. The court stated that since the student could not show system-wide sex discrimination, respecting access to programs and activities in general, the court was required to see whether the particular program in contention received federal assistance. Finding that the golf team received no federal assistance, the court held it could not grant the student any relief.[119]

4.6 SUBSTANTIVE RIGHTS

4.6a Search and Seizure

Three cases concerned search and seizure in 1981. A school procedure concerning locker searches was upheld in one of the cases. Searches of students by "sniff" dogs and by school and private personnel were struck down in the other two cases.

The Tenth Circuit Court of Appeals found that use of "sniffer" dogs in searching lockers for contraband was not unconstitutional. In addition, the court upheld the school's disciplinary penalty imposed when marijuana was found in one of the lockers. The search was a blanket, warrantless search of the lockers, and no student was suspected of possessing marijuana at the time it was started. Sniff dogs detected marijuana in one of the lockers and it was found when the locker subsequently was searched. The student whose locker contained the marijuana was summoned to the principal's office for disciplinary action, but no criminal proceedings were sought. The court of appeals held that the school had a right to conduct the locker search and that once probability was established that a locker contained contraband, it was legal to search it. Following the pattern in all such cases in recent years, the court held that a school locker is not the property of the student who controls it.

As for the disciplinary action, the school had transferred the student to another school in the district, and he argued it was of lesser quality than the one he had been attending. The court was not impressed with the student's contention that this punishment violated his constitutional rights to an education and to due process of law. The court found that ample due process had been provided. The student was not deprived of an education in the new placement, and consequently, no constitutional rights had been violated.[120]

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[119] Othen v. Ann Arbor School Bd., 507 F. Supp. 1376 (E.D. Mich. 1981).

In a case which centered more on the use of "sniff" dogs, a district court in Texas found their use, and subsequent body searches, to be in violation of the Fourth Amendment. The school used a private corporation to carry out the sniffing procedure. Dogs were brought into the classroom and allowed to sniff each student. The students identified by a dog were removed from class and told to empty their pockets. The school then took the dog to the parking lot where it picked two cars which, when searched, were found to contain contraband. As a result of these proceedings, three students were suspended for three days, accruing a total deduction of nine points from the course grades of each student for the final quarter of the school year. This penalty made it mathematically impossible for one of the students to graduate on schedule.

The court held that the search, though conducted by a private company, constituted state action and that the use of the dogs was a search under the Fourth Amendment. Following the reasoning of other courts considering this issue, use of such dogs does not merely enhance human senses but replaces them, similar to an electronic bug. The fact that students had been forewarned of surprise visits by the sniffer dogs did not enhance the school's claim that their use was justified. The court held that by using dogs the school had exceeded constitutional bounds in conducting the search without any reasonable suspicion that a particular student possessed illegal substances.

Since the sniff-search was unconstitutional, thus eliminating the sole reason for suspecting the student, the subsequent physical searches of the students were also unreasonable under the Fourth Amendment. As for the search of the cars, the court decided that since students had no access to the cars during the school day, the school had a minimal interest in the contents of the vehicles. Consequently, those searches were unconstitutional. Since all evidence had been illegally obtained, the court found that the suspension and grade losses violated the students' rights. The school was ordered to restore to the students that which they lost due to the penalty.[121]

A Maryland appeals court held that a school had searched one of its students in violation of that state's education code. The case involved the theft of a watch and ten dollars from a gym locker. Because the case involved criminal action against the student, the higher standard of "probable cause" to suspect a wrong-doing, rather than "reasonable cause," was applied in the case. The student had been charged with being delinquent. The court found that the mere fact that the student had been seen "hanging around" the locker near the time the crime took place only created suspicion and did not constitute probable cause. Therefore, the search of the student which resulted in finding the stolen watch in the student's possession was in violation of the state education code. The court applied the exclusionary rule to exclude the watch and the student's incriminating comments made after the watch was found as evidence in the case against the student.[122]

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[120] Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981).

[121] Jones v. Latexo Indep. School Dist., 499 F. Supp. 223 (E.D. Tex. 1980).

4.6b First Amendment Religious Rights

In 1981, cases involving religion in the public schools were heard by four federal circuit courts of appeal. The results did not please supporters of religion in public schools. Appeals courts struck down prayer during school hours, in classrooms and at assemblies, and a voluntary student-organized prayer group was prohibited from holding prayer meetings on school premises before school. In addition, the Fifth Circuit found that a Bible literature course unconstitutionally advanced religion. In a Utah case, many aspects of a released-time program were upheld. Finally, student plaintiffs prevailed against a Texas school's policy which limited the number of excused absences for religious holidays. A common thread in all these cases was the application of the three pronged test for state action on religious issues which the Supreme Court established in *Lemon v. Kurtzman.*[123]

The Second Circuit Court of Appeals held that a voluntary prayer group that was organized by students did not have a constitutional right to hold meetings on public school premises immediately before the school day began.[124] A group of high school students had sought permission from their school principal to hold prayer meetings in a classroom before the day's classes commenced. They did not seek any supervision or involvement of school faculty. They explained that the activities were voluntary and would not conflict with other school activities. The principal, superintendent, and school board all denied the request. The students claimed in court that this denial violated their rights under the First and Fourteenth Amendments.

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[122] *In re* Dominic W., 426 A.2d 432 (Md. Ct. Spec. App. 1981).

[123] 403 U.S. 602 (1971).

[124] Brandon v. Board of Educ. of Guilderland Cent. School Dist., 635 F.2d 971 (2d Cir. 1980).

The district court disagreed,[125] finding that the school was barred from granting permission by the establishment clause of the First Amendment. Furthermore the court held that a grant of permission would unconstitutionally advance religion and that the necessity of faculty surveillance to assure that the meetings were voluntary would create an unconstitutional entanglement between the state and religious activities. In addition, the judge asserted that the equal protection clause did not require the school to treat religious organizations and secular groups in a similar manner.

In affirming the district court's decision, the court of appeals agreed with the district court's view that there would be excessive entanglement through necessary faculty surveillance. An important point in the case revolved around when the school day actually began. Classes began at 7:50 a.m. while buses arrived between 7:20 and 7:40 a.m. The court ruled that the school day actually began when the buses arrived and that since the prayer meetings were to be held after the arrival of buses, these meetings were actually to be held during school hours.

The court refuted the students' arguments of denials of freedom of speech and equal protection by citing the United States Supreme Court's finding that the establishment clause explicitly prohibits prayer in the public schools.[126] Since all religious organizations were denied access, there was no violation of equal protection.

In another school prayer case the Ninth Circuit Court of Appeals found that the recitation of public prayers by a student council at its school assemblies during school hours was in violation of the establishment clause. The student council had requested permission to begin school assemblies with a prayer. The school principal approved the request. Students who did not wish to attend were allowed to go to a supervised study hall. The school system subsequently was sued by a mother of two students on the grounds that the prayers violated the First Amendment.

The court of appeals found the fact that assembly attendance was voluntary was no defense against a claim of unconstitutionality. The court held that since the prayers failed to survive any part of the three pronged test, the school officials had violated the establishment clause when permission for the prayers was granted.[127]

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[125] Brandon v. Board of Educ. of Guilderland Cent. School Dist., 487 F. Supp. 1219 (N.D.N.Y. 1980). *See* YEARBOOK 1981 at 162-63.

[126] School Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

[127] Collins v. Chandler Unified School Dist., 470 F. Supp. 959 (D. Ariz. 1980). *See* YEARBOOK 1980 at 198; 644 F.2d 759 (9th Cir. 1981).

The Fifth Circuit Court of Appeals also heard a school prayer case last year. The court reversed a district court's decision and held that a Louisiana statute on school prayer was in violation of the First Amendment.[128] The statute at issue authorized school officials to allow teachers to ask their students if one of them wished to give a prayer during the class time, and if no one volunteered, then the teacher was allowed to pray. The prayer time was limited to no longer than five minutes. The statute stated that no teacher or student was to be compelled to pray. Students whose parents objected to prayer were not required to remain in the classroom during the prayer time. The school system involved in the case implemented the statute with some modifications. Prayers were to be no longer than one minute. In addition, the school required that a student who wished to participate in prayer must obtain written consent from his/her parents and make his/her own verbal request. Students who did not wish to participate were either to remain quietly in the classroom during the prayer time or outside the classroom under supervision.

The court of appeals applied the three-part *Lemon* test. First, the state claimed that the statute had a secular legislative purpose. The statute was intended to increase religious tolerance and "to develop in students a greater esteem for themselves and others by enhancing their awareness of the spiritual dimensions of human nature."[129] However, the court felt that prayer was clearly religious, and held that the state could not use religious means to achieve a legitimate secular goal. Therefore, the statute failed the first part of the test. The court ruled that the statute failed the second because religion was promoted through practicing a religious ritual. Finally, the statute failed the third part of the test by causing excessive governmental entanglement with religious activity. The court held that the fact that the program was voluntary was irrelevant to establishment clause analysis.

In another Fifth Circuit Court of Appeals case, morning devotional readings over a school's public address system and a Bible literature course were found to be unconstitutionally advancing religion. The circuit court's decision reversed the district court's finding that the case was moot due to the school's cessation of the devotionals and the fact that the Bible course was not being offered at that time. Voluntary cessation of illegal conduct did not make the case moot. Since both sides agreed on the unconstitutionality of the morning devotionals, the circuit court case centered on the issue of the Bible literature course. The Bible course used a state approved text entitled *The Bible for Youthful*

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[128] Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981).
[129] *Id.* at 900.

Patriots, Parts I and II. There was expert testimony stating that the textbook reflected a fundamentalist, evangelical, protestant perspective, and therefore, the effect of a course using the textbook would be to advance or study religion. Consequently, the court ruled that the course was in violation of the establishment clause. The court remanded the case to the district court, instructing it to enjoin the use of the textbook and to ensure that the Bible literature course would be taught within a secular framework.[130]

The Tenth Circuit Court of Appeals affirmed in part and reversed in part a district court's decision concerning a school's released time program.[131] Both courts relying on *Zorach*[132] held that such programs did not offend the Constitution *per se.* However, the courts differed as to what parts of this particular program were unconstitutional. The case involved a Utah school system which allowed high school students to attend courses sponsored by a religious organization. These courses were taught off the school premises and thus students were released from school to attend them. The overwhelming number of participating students chose to attend classes at a seminary operated by Church of Jesus Christ of Latter-Day Saints (LDS). Thus, the case revolved around the administration of the released time program concerning the LDS church and the physical plant of the LDS seminary.

First, the school employed an attendance enforcement procedure under which the school supplied the seminary with prepared attendance slips and had students go to the seminary and pick them up. The district court ruled that this unconstitutionally entangled the school with a religious institution. The appeals court partially disagreed. It decided that while it was unconstitutional for the school to assume the burden of gathering the attendance slips, it was constitutional for the school to provide the prepared attendance slips to the LDS seminary. The court felt that supplying the LDS seminary with the slips was the most efficient way of integrating the released time program's report of attendance into their own attendance data collection procedures.

The second issue raised concerned the fact that the LDS seminary's intercom system was connected to the school's public address system. This was so that school announcements and class bells could be heard by the students participating in the released time program. Also at issue were boxes in the school buildings where school notices and information could be obtained by seminary personnel. The appeals court ruled that both the intercom system and the boxes met all three parts of the three pronged test and consequently were constitutional.

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[130] Hall v. Board of School Comm'rs of Conecuh Cty., 656 F.2d 999 (5th Cir. 1981).

[131] Lanner v. Wimmer, 463 F. Supp. 867 (D. Utah 1978). *See* YEARBOOK 1980 at 198-99; 662 F.2d 1349 (10th Cir. 1981).

[132] Zorach v. Clauson, 343 U.S. 306 (1952).

The final issue at contention concerned credit given by the school for courses offered in the seminary through the released time program. In 1969, the Utah board of education adopted a policy that authorized high schools to give no more than two credits of Bible history for work taken in private seminaries or schools. These credits were to be counted as "elective" and not to be in fulfillment of any required instruction. Further, no credit was to be given to any course which was devoted mainly to denominational instruction. Both the district court and the appeals court agreed that granting credit for released-time courses to satisfy elective course requirements was unconstitutional, insofar as the state board of education policy required the schools to judge whether the courses were "mainly denominational" in their content. The appeals court noted that a school which could grant elective credit to a released-time course without having to inquire as to its religious content was not prohibited from granting the elective credit by the court's ruling.

In contrast to elective credit, the appeals court reversed the district court's ruling that credit granted in fulfillment of general compulsory attendance requirements was unconstitutional. The appeals court referred to this as custodial credit. Relying on *Zorach*, the court found that granting custodial credit was the same as permitting the released-time program.

Similarly, the appeals court reversed the district court's finding that granting eligibility credit and funding credit was unconstitutional. Eligibility credit referred to the school's policy of requiring a student to take six credit hours per day in order to be eligible for honor role and extracurricular activities. Funding credit referred to the fact that a Utah school can receive funding for a student only if he/she has attended at least four class periods of the day. The court decided that allowing the released-time course to be one of those four periods neither enhanced nor inhibited religion and consequently was constitutional.

The final issue in the case concerned attorney's fees. The district court denied the plaintiffs' attorney's fees and the appeals court affirmed the decision. However, upon rehearing the issue, the appeals court remanded to the district court to reconsider the issue of attorney's fees.

In a free exercise case in Texas, a federal district court found that a school's policy for excused absences was unconstitutional.[133] The policy in question allowed only two excused absences per school year for religious holidays. Students who received unexcused absences were allowed to make up their homework and/or tests missed. However, they were given automatic zeroes for the made up work. Students who were members of the Worldwide Church of God sued the school because a fundamental tenet of their church is that on seven annual holy days members must abstain from secular activity. In addition, members must attend a seven day convocation on the Feast of the Tabernacles. These church requirements could result in student members missing eight to ten days of school per year. The court found that the school policy placed an unconstitutional burden on the students' free exercise of religion. The schools interest in requiring regular attendance and keeping teachers from bearing the burden of grading made up work were not sufficient to warrant the limitation on the students' constitutional rights.

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[133] Church of God (Worldwide Texas Region) v. Amarillo Indep. School Dist., 511 F. Supp. 613 (N.D. Tex. 1981).

4.6c First Amendment Freedom of Expression

Federal and state courts entertained only four freedom of expression cases last year. In all of the cases, the student plaintiffs lost. Students found that their school can regulate which plays the school will sponsor and on what nights they are to be given, can decide whether the band has received permission for trips, and can suspend a student for wearing a button with a vulgar slogan.

High school students in Delaware were unable to convince a district court that their First Amendment rights were violated by their school superintendent. At issue was the superintendent's decision not to allow the high school to put on the play *Pippin* because of its emphasis on and reference to sexual activity. He decided that it was not feasible to modify the play to a point where it would be appropriate for a high school production. Several students then filed suit, claiming they were being denied First Amendment rights. The students argued that recent decisions on removal of books from school libraries supported their case. The district court disagreed. The fact that two noncensored copies of the play were in the school's library showed that the school was not foreclosing "the free exchange of ideas by students." Also, the court found that the students could not show where they had any constitutional right to participate in any particular production of a dramatic work. Just as the school had the right to choose the content of its courses, it had the right to choose what plays it will sponsor.[134]

In another school play case, a New Jersey appeals court held that a school policy which prohibited extracurricular activities on Friday evenings, Saturday during the day, and on Sunday mornings did not violate the establishment clause.[135] The student plaintiffs in the case had wished to put on a school play on Thursday, Friday, and Saturday evenings. The Friday performance fell victim to the school board's policy. The plaintiffs asserted that prohibition of the play during traditional times of worship violated the establishment clause. The court held that the policy passed constitutional muster on the basis of the three pronged test established in *Lemon v. Kurtzman*.

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[134] Seyfried v. Walton, 512 F. Supp. 235 (D. Del. 1981).

In a quite different case, a district court in Ohio ruled that members of a high school band were not able to show any arguable controversy where the school board had denied the band permission to participate in activities in Florida. The plaintiffs had failed to show where the denial by the school board prohibited participation, injured, or penalized them in any way. The mere fact that the school board denied permission and sent word of their action to Florida authorities in charge of the band activities did not threaten the students' rights. School authorities did not spell out the disciplinary penalties which would be forthcoming were the students to go to Florida. The court ruled that even if a penalty could be shown, there would have been no violation of the Constitution. Students, the court noted, do not have a constitutional right or property interest in participation in extracurricular activities.[136]

In a California case, a student was unable to pursuade an appeals court to grant an injunction against school authorities who had suspended him for wearing a button exclaiming "Fuck the Draft."[137] The facts showed that the California Administrative Code stated, "Every pupil shall . . . refrain entirely from the use of profane and vulgar language."[138] The court found the regulation to be valid and the words on the button vulgar. The court noted that the student was not being denied his freedom to express his discontent with the draft for he did that in a newspaper which he distributed at the school. It was just the way in which he expressed himself that the school was regulating. The court found that the student did not have a constitutional right to wear the button merely because it was "political" protest. Consequently, the school was found to be completely within its authority to regulate the conduct of its students, as it had in this particular case.

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[135] Student Members of Playcrafters v. Board of Educ., 424 A.2d 1192 (N.J. Super. App. Div. 1981).

[136] Park Hills Music Club, Inc. v. Board of Educ., 512 F. Supp. 1040 (S.D. Ohio 1981).

[137] Hinze v. Superior Ct. of Marin Cty., 174 Cal. Rptr. 403 (Cal. Ct. App. 1981).

[138] *Id.* at 404.

4.7 SANCTIONS FOR STUDENT MISCONDUCT

4.7a Suspensions and Expulsions

Cases involving exclusionary discipline frequently are determined by the adequacy of the due process hearing received by students before they are suspended or expelled. Several 1981 cases raised questions about the right of students to call witnesses or to cross-examine school personnel during expulsion hearings. In past years, these cases also presented issues of substantive fairness, as students challenged the reasonableness of rules under which they were removed from school. Courts in 1981 continued the trend of recent years in refusing to find school rules unreasonable, or to characterize some penalties as "cruel and unusual punishment" under the Eighth Amendment. In the few cases where school disciplinary decisions were overturned, school systems had neglected to follow their own clearly written policies, or had ignored controlling state statutes governing suspension and expulsion.

The Eighth Circuit Court of Appeals considered a case in which a school board neglected to follow its own written school rules. A district court had overturned the school board's decision in the case because the board had suspended the student for being intoxicated at school under a school rule allowing suspension for the rest of a term for drug use. The school also had a rule against the consumption of alcoholic beverages, but that rule did not require expulsion for a violation. The court of appeals refused to find that alcohol was a "drug," especially given the existence of the separate rule governing alcohol use. The court concluded, then, that the student's substantive rights had been violated and uheld the lower court's order which granted the student credit for the missed semester.[139]

A Kentucky district court considered a case in which a student had been expelled for the remainder of the school year for smoking marijuana.[140] Kentucky has a state statute which specifically authorizes expulsion for the first offense in cases involving student drug or alcohol abuse. The school system had instituted a policy of automatic expulsion for the offense and the student claimed the policy violated his substantive rights. In considering the school's action, the court noted that substantive issues could be raised in school discipline cases if there was a substantial disparity between the offense and the penalty. Courts have been reluctant to find such a disparity, however, and the district court in this case was no exception. The Kentucky court concluded that schools across the country "are experiencing dire difficulties" and that stiff penalties were appropriate to keep drugs out of the public schools. In this case, then, the action of the school board was sustained and the court concluded, "Their efforts are to be commended, rather than undermined by this court."[141]

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[139] McCluskey v. Board of Educ. of Rogers, Arkansas, 662 F.2d 1263 (8th Cir. 1981).

[140] Petrey v. Flaugher, 505 F. Supp. 1087 (E.D. Ky. 1981).

In a similar case, a New York student was suspended for one year for dropping a lighted match in a garbage can filled with paper, causing his school to be evacuated. A teacher also was injured fighting the fire. After his suspension by the school board, the penalty was affirmed by the state commissioner and overturned by a local court. The school district appealed. In reviewing the case, the appeals court concluded that the student's rights to substantive fairness had been met and overruled the lower court. There was nothing "irrational" or "shocking" about the penalty, the appeals court concluded.[142]

An Illinois student who was suspended rather than submit to corporal punishment filed suit claiming that the penalty was excessive.[143] The student's suspension for five days for fighting occurred during an examination period and the student's grades suffered as a result. The other student involved in the incident received two swats with a paddle and was returned to class. The plaintiff's parents, however, had followed a school board rule in asking that no corporal punishment be administered to their child. For that reason, the suspension penalty was employed. In looking at these facts, the appeals court decided that the penalty was not unreasonable, and that the negative consequences for the student stemmed from the fact that the fight occurred just prior to exams, hardly a fault caused by the school, and from the parents' own decision not to permit corporal punishment for their child.

It is generally accepted that students have the right to cross-examine witnesses in expulsion hearings before school boards. This issue was raised again in a California case where a student was expelled for allegedly participating in a fight following a high school football game. The fight, which had racial overtones, was not witnessed by school personnel, but students on the scene provided statements implicating the plaintiff. At the school board expulsion hearing, however, the student's counsel was not allowed to cross-examine the witnesses on the ground that retaliation to those testifying might occur.

The court noted the significant property right at stake and concluded that the credibility of the witnesses and their testimony might have been determinative in the case. It was possible, the court reasoned, that the memories of those signing the statement might be faulty, or that they might be motivated by malice or some other factor. As to the risk of retaliation, the court observed that the names of the witnesses signing the statement were already known, making added risk unlikely. The court concluded that cross-examination was a fundamental right in such cases and, since it had been denied, ordered the plaintiff's expulsion expunged from the record.[144]

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[141] *Id.* at 1091.

[142] Hogan v. Board of Educ. of North Colonie, 442 N.Y.S.2d 623 (N.Y. App. Div. 1981).

[143] Donaldson v. Board of Educ. for Danville, 424 N.E.2d 737 (Ill. App. Ct. 1981).

Another California court considered whether a student was properly expelled when the school board's decision occurred after the twenty-day limit specified in state statutes for hearing such cases had passed.[145] The student had been found in possession of a knife but was expelled by the school board four days after the time deadline had expired. The court was faced with deciding whether or not the delay was significant. To answer this question, the court looked at the legislative history of the limit. It found that the applicable section had been created in response to the Supreme Court decision in the *Goss* case,[146] which held that students had a legitimate property interest in receiving an education which could be taken away only after appropriate due process. In response to *Goss*, the California statute was enacted in 1976 with the twenty-day hearing period requirement. The legislature further defined the twenty days, in 1978, changing "calendar days" to "school days." The court construed this change as indicating that the legislature had attached significance to the hearing requirement. Under the circumstances, the appeals court concluded that the requirement was mandatory and the failure to act in a timely fashion therefore voided the expulsion.

A Missouri appeals court considered the issues presented by an indefinite expulsion of a student for disruptive behavior. The student was found guilty of a variety of offenses including gross vulgarity directed at a female teacher. On appeal, the student alleged that the punishment he received was excessive, and "cruel and unusual" under both Missouri and United States Constitutions. The court could find no support for these claims. In addition, the student claimed he was not provided the right to cross-examine witnesses. The court also rejected this claim, noting that the student did not indicate how the missing testimony would have enhanced his case, nor did he ask the school board to have the witnesses attend a later hearing.[147]

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[144] Aguirre v. San Bernadino City Unified School, 170 Cal. Rptr. 206 (Cal. Ct. App. 1980).

[145] Garcia v. Los Angeles Cty. Bd. of Educ., 177 Cal. Rptr. 29 (Cal. Ct. App. 1981).

[146] Goss v. Lopez, 419 U.S. 565 (1975).

[147] Ring v. Reorganized School Dist. No. 6, 609 S.W.2d 241 (Mo. Ct. App. 1980).

4.7b Corporal Punishment

A Connecticut case raised the frequently litigated issue of "excessive" corporal punishment. Unlike such cases in previous years, the Supreme Court of Connecticut found ample evidence that the punishment had exceeded reasonable limits. The student was enrolled in a music class and misbehaved by changing the words in a song being sung. In response to this behavior, the teacher threw the student into a chalk board and then dragged the unresisting student to a hallway where he was swung against a wall, fracturing the student's clavicle. The teacher claimed immunity from suit both as a "public officer" and as a state employee, but the court concluded he was neither under the state general statutes. While holding that teachers could use "reasonable means" to control a student, the court found that the punishment in this instance was "clearly excessive." The lower court's award to the student was upheld.[148]

4.8 TESTING AND PLACEMENT

Litigation concerning the Florida State Student Assessment Test reached the Fifth Circuit Court of Appeals in 1981.[149] This was the first case concerning competency testing to reach a federal court of appeals and thus attracted substantial interest. The challenged test was mandated by the Florida legislature as part of its "Educational Accountability Act of 1976." The act established minimum performance standards for public school children, requiring periodic testing and remedial classes for children who failed. In 1978, passage of the test was made a state-wide public high school graduation requirement.

Following three testing periods which occurred between October, 1977 and May, 1979, 1.9 percent of white students and 20.0 percent of black students, then high school seniors, failed to pass the test. A class action suit was filed on behalf of those minority students who did not pass, alleging multiple due process violations.[150] It was argued that the test was racially discriminatory and that there was inadequate notice that the test would become a graduation requirement. Use of the test was stayed for four years by the district court and both parties appealed.

The court of appeals concluded that a competency test, *per se*, had a "rational relation to a valid state interest." But, as to the test in question, the court concluded the record "is simply insufficient in proof that the test administered measures what was actually taught in the schools of Florida."[151] While the state argued that the test did address what was taught, no formal study had been conducted on that point. The court noted that any test with items from outside the curriculum would violate the equal protection and due process clauses. For this reason, the lower court's four year limit on when the test would start as a graduation requirement was voided and the case was remanded for further proceedings on the question of the test's "curricular validity."

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[148] Sansone v. Bechtel, 429 A.2d 820 (Conn. 1980).

[149] Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981).

[150] Debra P. v. Turlington, 474 F. Supp. 244 (M.D. Fla. 1979). *See* YEARBOOK 1980 at 212-13.

The court of appeals also sustained the lower court's ruling that the test punished black students who faced educational deficiencies created by Florida's previous dual-race school system. The court also agreed that there was no equal protection violation arising from the fact that the test was not administered to non-public school children. Finally, the appeals court concluded that the test did not violate Title VI of the 1964 Civil Rights Act.

The use of an "exit examination" by the Tattnell, Georgia County Board of Education was further litigated in 1981.[152] Under the county board's plan, students graduating were required to achieve a ninth grade equivalency score on the California Achievement Test before they could receive a high school diploma. The policy was challenged and a state court rejected a variety of state law and due process questions and upheld administration of the test.[153] The case was then refiled in federal district court with a number of procedural and substantive federal claims.[154] The plaintiffs raised Title VI issues and presented statistical evidence that minority children were discriminated against by the test because of past school segregation. Several test items were also alleged to reflect racial biases. Expert witnesses were marshalled by both sides to discuss testing procedures and test content and their voluminous testimony was considered by the district court in much detail. Section 504 claims were pressed on behalf of the district's handicapped students as well.

The district court finally approved the test, but focused on a side issue, concluding that the student tracking system employed by the county "cannot pass constitutional muster." Regardless of test scores, students were placed in separate classes and black children were exposed to less educational material. Thus the final standardized test results were flawed by past discrimination. Nevertheless, the school system would be permitted to reinstitute the diploma sanction in June, 1983, if it could show that the effects of the tracking system had been removed. The court also concluded that the use of the test before June, 1983 would violate Title VI because the system had not removed the "vestages of the dual educational system."

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[151] Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981) at 404.

[152] Anderson v. Banks, 520 F. Supp. 472 (S.D. Ga. 1981).

[153] Wells v. Banks, 266 S.E.2d 270 (Ga. Ct. App. 1980). *See* YEARBOOK 1981 at 184-85.

[154] Anderson v. Banks, 520 F. Supp. 472 (S.D. Ga. 1981) at 509.

The district court also addressed several due process claims. Considering that the test could be retaken and that there was more than two years notice before the graduation requirement had been instituted, the district court concluded that there had been adequate due process. The test failed, however, on substantive due process claims. Following the Florida Fifth Circuit case just discussed, the district court concluded that school authorities had the burden of demonstrating that their system actually taught the materials contained in the test. This might be easy, the court indicated, because the system did not develop its own test, but instead "selected a reliable and well-established test instrument." In addition, the court concluded that the system had previously misclassified retarded students, in violation of § 504, though the test requirement itself did not violate the Act. The court's lengthy order was issued to the many parties in the case and appeals on the issues raised are likely.

The question of handicapped students taking competency tests required for graduation was addressed by a New York judge. Two handicapped students filed suit to force the validation of the high school diplomas they had been given. The students, one suffering from a neurological impairment which allegedly affected her ability to do mathematical computations and the other classified as trainably mentally retarded, had completed individual educational programs but had not passed New York basic competency tests. The New York commissioner of education, on receiving word that the students had their diplomas but had not passed the required state test, ordered the diplomas invalidated. The local school district refused to provide the names of the students and the state department of education issued an order requiring the names. The entire matter was then litigated.

The court considered a variety of claims. It held that failure to grant the diplomas violated § 504, violated the terms of the Education for All Handicapped Children Act, denied the students' property and liberty interests without adequate notice, and that the commissioner did not have the power to enforce the competency regulation. All but the due process claim was rejected by the court. The court concluded that the students, who had been in school for twelve and fifteen years, respectively, did not receive adequate notice of the regulation, which had been imposed less than two years earlier. Thus the court ordered the diplomas validated.[155]

Two black children who had been placed in a class for educable mentally retarded pupils after taking standard intelligence tests were represented in an Illinois case.[156] The Chicago children fared poorly on the test and it was alleged in the suit that the tests were culturally biased. The federal government received permission to participate in the suit on behalf of the plaintiffs. Expert witnesses were called by both sides and the content of the Stanford-Binet IQ test was thoroughly analyzed. The court heard a lengthy analysis of most of the test items. The court finally concluded that some of the items were, in fact, culturally biased. But the court refused to attribute the lower mean performance of minority students on the test to the disputed items, holding that not enough items were tainted as to affect the general scores of the children. The court went on to conclude that some misplacements of students were possible under the system but refused to find that this was due to test use, concluding, "There is no evidence in this record that such misassessments as do occur are the result of racial bias in test items or in any other aspect of the assessment process currently in use in the Chicago public school system."[157] The court therefore found for the defending system.

A case originating in Virginia involving the use of a Ginn Reading Series test for student promotion to the third grade was heard by the Fourth Circuit Court of Appeals.[158] The § 1983 claim was filed on behalf of eighteen second grade students who were not promoted; only one student in the class where it was used passed the test. None of the students represented any protected group, so the appeals court focused solely on the question of whether the district had the power to institute such a policy. The court concluded that no constitutional rights were implicated by the school district's action and dismissed the suit.

In a Missouri case, an appeals court upheld a state education department policy on high school equivalency tests. The challenged rule limited the use of the test to those eighteen and older. The plaintiff was sixteen years old and wished to take the test so that he could enter college early. The appeals court concluded that the Missouri legislature had given the state department the power to establish "rules and regulations" regarding the tests and that the department did not violate its powers by setting the age limit. A lower court injunction was therefore voided.[159]

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[155] Board of Educ. of Northport-East Northport Union Free School Dist. v. Ambach, 436 N.Y.S.2d 564 (N.Y. Sup. Ct. 1981).

[156] Parents in Action on Special Educ. v. Hannon, 506 F. Supp. 831 (N.D. Ill. 1980).

[157] *Id.* at 883.

[158] Sandlin v. Johnson, 643 F.2d 1027 (4th Cir. 1981).

[159] Neaf v. Mallory, 622 S.W.2d 372 (Mo. Ct. App. 1981).

4.9 DESEGREGATION

4.9a Systemwide Remedies

Controversy continues to surround the progress of court-ordered desegregation in Cleveland, Ohio. Earlier decisions established that both the Cleveland board of education and the Ohio state board were responsible for maintaining intentional, system-wide segregation.[160] On remand, the federal district court ruled that both boards would be personally liable for implementing a remedy to address the problem.[161] In addition, an administrator of desegregation was ordered to direct the desegregation program. This order was appealed and subsequently modified by the Sixth Circuit Court of Appeals.[162] The appeals court approved the use of the administrator but held that the district court had improperly applied the standards of possible civil contempt to the board members. Noting that, "contempt sanctions at this time would deter efforts to achieve goals,"[163] the appeals court removed the threat of personal liability. The court of appeals then received a request for rehearing and clarification on the use of the administrator.[164] The court modified its earlier order, removing from the administrator the power to commit funds without the concurrence of the school board. The administrator was still left with sole administrative authority over "all issues affecting desegregation" and any conflicts between the board and the administrator were left to the district court to mediate.

In 1979, the Ninth Circuit Court of Appeals reversed a federal court which had held that the San Jose, California school district was operating a racially neutral neighborhood school policy.[165] The district court had found segregation, but concluded that the policies of the school board could not be held responsible for the situation. The appeals court observed, however, that nine new schools had been constructed in the district since 1965, none of which reduced segregation. On remand, the district court was to reconsider its decision in light of *Dayton II*[166] and *Columbus*.[167] In both cases, the United States Supreme Court had held that school boards could not escape the responsibility for remedying segregation, even if their official actions did not cause the one-race schools.

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[160] Reed v. Rhodes, 422 F. Supp. 708 (N.D. Ohio 1976); 607 F.2d 714 (6th Cir. 1979); *cert. denied*, 445 U.S. 935 (1980). *See* YEARBOOK 1981 at 186.

[161] Reed v. Rhodes, 500 F. Supp. 404 (N.D. Ohio 1980).

[162] Reed v. Rhodes, 635 F.2d 556 (6th Cir. 1980).

[163] *Id.* at 558.

[164] Reed v. Rhodes, 642 F.2d 186 (6th Cir. 1981).

[165] Diaz v. San Jose Unified School Dist., 612 F.2d 411 (9th Cir. 1979); *rehearing denied* 1980. *See* YEARBOOK 1981 at 187 and YEARBOOK 1980 at 217.

[166] Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979). *See* YEARBOOK 1981 at 186.

[167] Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979). *See* YEARBOOK 1981 at 186.

After reconsidering the case, the district court still held that there was no evidence of segregative intent and found for the defendants.[168] The court distinguished the San Jose situation from *Columbus*, holding that the Supreme Court required evidence that "discriminatory or segregative intent" was present in the board's decisions. The district court said it could not find compelling evidence of segregative intent in the case at hand. The court renewed the disputed neighborhood school plan adopted in San Jose and concluded that it should be allowed to continue, even though the court observed that the resulting segregation from the plan "was clearly foreseeable and was clearly foreseen by the school officials."[169]

Mandatory busing of school children in Los Angeles was the subject of several court decisions in 1981. With much national attention, the California Supreme Court let stand a state appeals court decision upholding a 1979 state-wide referendum which ended mandatory busing to achieve school desegregation in California.[170] A lower California state court had found that the referendum violated terms of the California constitution and this decision was allowed to stand, pending state appeal, but was overturned. The California appeals court concluded that the referendum did not violate the Fourteenth Amendment, because "it merely provides a more precise contour to the duty established by California law and court decisions to desegregate public schools regardless of cause."[171]

Litigation in the Los Angeles busing case then switched to federal court when the Los Angeles NAACP filed suit under 42 U.S.C. § 1983 claiming Fourteenth Amendment violations.[172] The plaintiffs argued that the Los Angeles board's decision to end busing was an intentionally segregative act and asked for an injunction to reverse the action. The plaintiffs claimed that the doctrine of *res judicata* prevented the federal suit. The court rejected this argument, noting that the plaintiffs in the federal case were different, as were the federal issues presented in the new litigation. Turning to the injunction request, the district judge observed that the burden was on the plaintiffs to show that the board had committed intentional segregative acts and concluded that they had met this burden, pointing to an earlier California Supreme

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[168] Diaz v. San Jose Unified School Dist., 518 F. Supp. 622 (N.D. Cal. 1981).

[169] *Id.* at 644.

[170] Crawford v. Board of Educ. of the City of Los Angeles, 170 Cal. Rptr. 495 (Cal. Ct. App. 1981). *See* YEARBOOK 1980 at 217-18.

[171] *Id.* at 510.

[172] Los Angeles NAACP v. Los Angeles Unified School Dist., 513 F. Supp. 717 (C.D. Cal. 1981).

Court decision that *de jure* segregation was present in Los Angeles.[173] Thus the district court issued the injunction barring the board's decision to end busing.

School officials in North Little Rock, Arkansas, were unsuccessful in their attempt to reverse a district court order directing that transportation services be provided to students living in a distant part of that system.[174] The students who had been denied the transportation were predominantly blacks from low income families. In addition, orders requiring nondiscriminatory policies of teacher hiring, assignment, and dismissal were sustained, as was an award of attorney's fees. The district court was also told to retain jurisdiction in the case until the district was "thoroughly integrated."

Parents in the Southeast Delco, Pennsylvania school district filed suit to prevent the closing of an elementary school in a predominantly black neighborhood.[175] The school had been closed as part of a systemwide desegregation plan. While being conscious of the need to ensure that the plan did not more adversely affect black students, the appeals court concluded that the decision to close the school was based on a rational consideration of the school's age and condition.

An Indiana federal court approved a consent decree involving the desegregation of the South Bend public schools.[176] A variety of parties participated in developing the plan for the district's 25,500 students, 23 percent of whom were black. No middle or high school would have a percentage of minority students greater or less than 6 percent of the district's minority total under the approved systemwide desegregation plan.

4.9b Cross-District Remedies

Following the United States Supreme Court decision in *Milliken*,[177] courts have held that cross-district school desegregation plans can be ordered if it can be demonstrated that several units of government have been responsible for school segregation in one of the districts. What constitutes "racially discriminatory acts of the state or local school district," however, is open to dispute, as the long histories of the litigation reported in this section indicate.

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[173] Crawford v. Board of Educ. of the City of Los Angeles, 130 Cal. Rptr. 724 (Cal. 1976).

[174] Davis v. Board of Educ. of North Little Rock, 635 F.2d 730 (8th Cir. 1980).

[175] Mitchell v. McCunney, 651 F.2d 183 (3d Cir. 1981).

[176] United States v. South Bend Commun. School Corp., 511 F. Supp. 1352 (N.D. Ind. 1981).

[177] Milliken v. Bradley, 418 U.S. 717 (1974).

In one such case involving school districts in western Pennsylvania, the Supreme Court let stand a decision by the Third Circuit Court of Appeals ordering preparation of a cross-district plan.[178] In 1973, the district court had found that the General Braddock Area School District had been created by the Pennsylvania board of education and county school boards and was a segregated system.[179] Concluding that the boards had knowingly created a segregated system, a cross-district remedy was ordered and several appeals were taken. In 1981 the court of appeals ruled that no further delay in fashioning a remedy would be permitted. Parties in the case had focused on several tuition plans which had been proposed as a means of settling the case, but this had delayed the outcome. In rejecting further debate on this subject, the court of appeals required that, "Under no circumstances should a new school year begin in the fall of 1981 without an acceptable remedial plan in place."[180] The matter was remanded to the district court to decide which districts should be included in the order.

On remand, the district court held that six school districts were to be involved in developing a remedial plan.[181] The court concluded that these districts had been involved in creating the original segregated district and that their boundaries would have to be redrawn. Two other districts were connected to the rest of the area by a single bridge and the court ruled it would be "highly impractical" to involve them in any plan. The court also noted that these districts already had a significant percentage of minority children. The court of appeals decision had set a ninety-day time limit for implementation of a plan, so it appeared that desegregation would occur in fall 1981.

In another protracted dispute, a cross-district remedy was ordered for Indianapolis children.[182] The city of Indianapolis contained several separate school districts, a situation which remained unchanged though the Indiana legislature passed a reorganization plan in 1969 known as "Uni-Gov" which ended separate governmental units within Indianapolis for most purposes except education. The Seventh Circuit Court of Appeals had previously ruled that a cross-district remedy could be ordered if it was found that Uni-Gov represented an official state action to further school segregation or if the actions of the local housing authority in building public housing in certain locations had the same effect.[183] Both actions would be a violation of *Milliken*. In its most recent opinion, the Seventh Circuit Court held, after a lengthy historical review, that discriminatory intent was present in both these acts and that a cross-district remedy would therefore be appropriate. The appeals court then considered the scope of the remedy which might follow.

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[178] Hoots v. Commonwealth of Pennsylvania, 639 F.2d 972 (3d Cir. 1981); *cert. denied*, 101 S. Ct. 3113 (1981).

[179] Hoots v. Commonwealth of Pennsylvania, 359 F. Supp. 807 (W.D. Pa. 1973).

[180] Hoots v. Commonwealth of Pennsylvania, 639 F.2d 972, 980 (3d Cir. 1981).

[181] Hoots v. Commonwealth of Pennsylvania, 510 F. Supp. 615 (W.D. Pa. 1981).

[182] United States v. Board of School Comm'rs of the City of Indianapolis, 637 F.2d 1101 (7th Cir. 1980); *cert. denied*, 101 S. Ct. 114 (1980).

The district court had called for the transfer of more than 6,000 students from the inner-city district to the eight other districts within the city, while the defending systems argued that the plan went too far. The appeals court, however, approved the plan, even though it was a "one-way" plan involving mostly the transportation of black children to previously all-white schools. The order excluded two of the districts in the area and a portion of the case was remanded so that the district court could weigh the extent to which the violations affected these districts. Finally, the appeals court required the state to pay for certain portions of the order and required that any future public housing be built in different areas of Indianapolis.

Litigation involving desegregation in Cincinnati also continued.[184] The case began in 1963 and has moved haltingly since that date, with numerous opinions issued along the way. With several key Supreme Court decisions in the meantime, the parties became involved with issues of *collateral estoppel* concerning the relitigation of issues arising from earlier cases. The defendants also raised claims of *res judicata* and the Sixth Circuit remanded the case so that these issues would be weighed.[185] The district court's most recent opinion was designed to answer the questions raised on remand. That court concluded its lengthy review of these matters by recording twenty specific orders on what issues could be litigated by the parties involved in the suit. Of greatest importance, plaintiffs were permitted to argue that several suburban districts had committed acts which had the effect of causing school segregation. All in all, the case showed potential for lasting into its third decade without resolution.

4.9c Developments Under *Swann* and *Keyes*

After reviewing *Keyes*,[186] a federal court concluded in 1978 that the Benton Harbor area school district was guilty of increasing *de jure* school segregation in that district.[187] The court found that the district had assigned teachers based on race, had employed segregative feeder practices, had worked with neighboring districts to provide places for white students seeking to leave the district and had engaged in discriminatory school boundary changes. At that time the court had ordered the state board not to pay the surrounding districts for the state tuition aids attached to the disputed students.

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[183] United States v. Board of School Comm'rs of the City of Indianapolis, 573 F.2d 400 (7th Cir. 1977); *cert. denied*, 439 U.S. 824 (1978).

[184] Bronson v. Board of Educ., 510 F. Supp. 1251 (S.D. Ohio 1980).

[185] Bronson v. Board of Educ., 525 F.2d 344 (6th Cir. 1975).

[186] Keyes v. School Dist. No. 1, 413 U.S. 189 (1972).

In a 1981 opinion, the district court addressed the question of an appropriate remedy.[188] The court did so after noting that Benton Harbor had "suffered an economic disaster within the past decade," and after observing that it was difficult to develop a desegregation plan for a city which had "an atmosphere of urban uncertainty, decay and chaos."[189] Several experts, including one appointed by the court, suggested desegregation plans. The court-appointed expert suggested that Benton Harbor itself be desegregated and that three other districts be involved in a magnet school plan. Other approaches called for the dissolution of the three districts and the creation of a unified system. After a review of these options, the court selected the proposal advanced by its own expert, and ordered the adoption of the magnet school concept. The court also required reassignment of staff, inservice training, and the formation of a committee to look at school discipline. A financing plan was also addressed, including a teacher bonus for those accepting voluntary reassignment.

In a case already involving several Supreme Court decisions and, as noted by the district court, some 1,043 docket entries, further action was taken to advance school desegregation in Wilmington, Delaware, and ten adjacent suburban districts.[190] In 1978 a plan to dismantle the eleven-district county school system was prepared and in 1980 a state plan called for the creation of four school districts in the area. That plan was the subject of the 1981 federal court decision. Plaintiffs in the suit attacked the four-district arrangement on the grounds that it protected "identifiably white interests at the expense of the black victims of the underlying constitutional violation" and that it would not lead to a desegregated system. The state board requested modification of the 1978 court-approved plan to incorporate its recently prepared four-district approach.

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[187] Berry v. School Dist. of City of Benton Harbor, 467 F. Supp. 630 (W.D. Mich. 1978). *See* YEARBOOK 1980 at 222-23.

[188] Berry v. School Dist. of City of Benton Harbor, 515 F. Supp. 344 (W.D. Mich. 1981).

[189] *Id.* at 347.

[190] Evans v. Buchanan, 512 F. Supp. 839 (D. Del. 1981).

The Delaware District Court took as its assignment the determination of whether or not the plan would leave racially identified districts and whether the plan was compatible with the court's previous rulings on pupil assignment criteria. After a detailed analysis, the court concluded that these tests would be met by the plan. The court then turned to the question of whether the state board could insure that its plan would be implemented by the districts involved. The court noted that state courts might hold that the state board lacked the necessary powers, and that "the racial tension and divisiveness that would result would seriously imperil desegregation."[191] For this reason, the court refused to approve the state plan, waiting instead for the General Assembly of Deleware to pass legislation giving the state board the needed powers. They were given sixty days to enact such legislation and the court withheld a final order in the case.

In 1980 a federal district court rejected a Nashville desegregation plan because it placed a disproportionate burden on black children.[192] Citing *Swann*,[193] the court found that exact ratios of black and white children need not be a part of every desegregation plan and suggested that the board of education in Nashville might consider less busing and a minimum of 15 percent minority student population in each school rather than their proposed target of 32 percent. In 1981 the court considered two plans prepared in response to its 1980 decision.[194]

The two competing plans were prepared by the plaintiff and the school board. The plaintiff's plan involved busing of elementary school children and a complicated system of splitting elementary grades so that students would attend some elementary grades in one building and some in another. After reviewing expert witnesses testimony, the court concluded that this approach was "haphazardly constructed and unworkable." The board's competing plan involved several subcomponents, including K-4 remediation, magnet schools, middle school reorganization, programs in black history, and other multicultural programming. The remediation program would be directed at those classes where student achievement levels were below-average for the system. This was the plan which the court accepted. The court approved a timetable for implementation and withdrew its 1971 order in the case, deciding that its terms were obsolete.

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[191] *Id.* at 872.

[192] Kelley v. Metropolitan Cty. Bd. of Educ. of Nashville and Davidson Cty., 492 F. Supp. 167 (M.D. Tenn. 1980). *See* YEARBOOK 1981 at 194-95.

[193] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

[194] Kelley v. Metropolitan Cty. Bd. of Educ. of Nashville and Davidson Cty., 511 F. Supp. 1363 (M.D. Tenn. 1981).

In 1978 a federal district court approved a desegregation plan for Galveston, Texas.[195] The plan involved the use of a magnet school approach with significant busing of children. A quota of minority students was established for one of the schools and the court indicated that, following *Swann*, more orders might be forthcoming if the goal were not met. Such was the case, and the school district sought, in 1981, to have the percentage requirement changed.[196] In the meantime, federal judges changed in the district. The new court reconsidered the quota and decided that the current 63 percent minority percentage at the school in question was sufficient and that the magnet plan, in general, was constitutionally acceptable. The alternative plan necessary to reach a 50 percent level of minority students involved the busing of elementary school children and the court was unwilling to order such a step.

The construction of an all-black school staffed by black teachers was held by the Sixth Circuit in a 1980 decision to represent the unconstitutional segregation of school children.[197] The district court had previously held that the school was simply a neighborhood school, constructed without any intent to segregate, but the appeals court rejected this argument and remanded the case. The district court then considered several desegregation plans advanced by the parties in the case.[198] It ordered adoption of a cluster plan requiring students in grades one through three to attend the formerly black schools and those in grades four through six to attend the formerly white schools. The order was set for implementation in the middle of the 1980-81 school year.

4.9d Other Federal Cases

Three other cases were heard by federal courts last year. First, the Ninth Circuit Court of Appeals affirmed a district court's finding that Washington State's Initiative 350 was unconstitutional.[199] In 1978 Washington's voters adopted ballot Initiative 350, which stated that school boards could not require any student to attend a school which was not geographically nearest or next nearest to the student's home. The initiative contained some specific exceptions for special education students and where hazardous travel conditions or physical overcrowding of a school existed. The appeals court found a suspect racial classification was created by the initiative when it failed to allow desegregation as a valid exception. The state was not able to show any compelling interest in removing local control over desegregation policies and consequently the initiative was found to be in violation of the equal protection clause.

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[195] Smiley v. Vollert, 453 F. Supp. 463 (S.D. Tex. 1978). *See* YEARBOOK 1979 at 220.

[196] Smiley v. Blevins, 514 F. Supp. 1248 (S.D. Tex. 1981).

[197] United States v. School Dist. of Ferndale, Michigan, 616 F.2d 895 (6th Cir. 1980). *See* YEARBOOK 1981 at 192.

[198] United States v. School Dist. of Ferndale, Michigan, 499 F. Supp. 367 (E.D. Mich. 1980).

[199] Seattle School Dist. No. 1 v. State of Washington, 473 F. Supp. 996, 663 F.2d 1338 (9th Cir. 1980). *See* YEARBOOK 1980 at 223-24.

While upholding the district court's principal holdings in the Washington case, the appeals court reversed the district court's ruling concerning attorney's fees. The district court had denied an award of plaintiff's attorney's fees on the basis that the school district was publicly-funded. The appeals court disagreed, stating that as long as a publicly-funded organization advances important constitutional issues it is eligible to receive attorney's fees.

The Sixth Circuit Court of Appeals vacated a district court's ruling that the Kalamazoo school system should be required to continue an Emergency School Aid Act (ESAA) program and a program recommended by court-appointed experts.[200] This case started in 1971 and the current round of litigation began in 1977 with allegations that, while desegregation had been attained among the schools, it had not been attained within individual schools. The court of appeals disagreed with the district court's legal proposition that a system is "not unitary if black students are over or under represented in various academic courses and extracurricular activities."[201] In addition, the appeals court found that it was improper to assume that the documented disparity between the achievement of black and white students was in some way related to the system segregation which ended in 1971. Consequently, the appeals court held that the district court erred in requiring the Kalamazoo school to desegregate students within its schools by continuing its ongoing ancillary cognitive and behavioral programs for minority students under the ESAA and by implementing the recommendations of court-appointed experts. However, the appeals court affirmed the district court's finding that the state board of education was responsible for paying for the expenses of the report of the court-appointed experts. The case was remanded.

Finally, the Ninth Circuit Court of Appeals ruled against the Idaho state board of education, which claimed that Idaho law did not empower them to supervise local school districts in order to ensure that they were in compliance with federal civil rights laws.[202] The appeals court did not decide whether local districts were currently in compliance with the federal laws, but merely that in this instance the board of education was empowered and required to ensure that the needs of students with limited English language proficiency were addressed.

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[200] Oliver v. Kalamazoo Bd. of Educ., 640 F.2d 782 (6th Cir. 1980). *See* YEARBOOK 1981 at 34-35, 99, 108-09, 2[illegible]3.

[201] *Id.* at 809.

[202] Idaho Migrant Council v. Board of Educ., 647 F.2d 69 (9th Cir. 1981).

4.9e Fifth Circuit Cases

Additional decisions were rendered in 1981 by the Fifth Circuit Court of Appeals in a number of continuing desegregation disputes. In a Dallas, Texas, case a federal district court was asked by the Fifth Circuit to consider ways in which the number of one-race schools in that city might be reduced.[203] The district court considered a number of plans in great detail before reaching its decision.[204] The plan currently in force involved the use of magnet schools, majority to minority school student transfers and remedial programming in one school. After rejecting additional busing, the court invited several intervenors and the parties in the case to propose plans for additional desegregation which would include further student transfers, better dissemination of information about the transfer program, expansion of the remedial program to other minority schools, greater use of magnet schools, and some attendance zone changes. All participants were ordered to submit their plans by October, 1981.

In a related issue arising out of the Dallas litigation, the Fifth Circuit refused to order changes in the school system's disciplinary policies.[205] Plaintiffs in the case had argued that the discipline system unconstitutionally discriminated against black students, pointing to differential rates of punishment experienced by the minority students. The system had a third party hearing board composed of one black member, one white, and one Mexican-American. Parties appearing before the board could be represented by counsel and had the right to almost full due process. The plaintiffs objected to the fact that the school system's attorneys presented cases before the board when the student was represented by counsel, and they advanced other procedural arguments as well. They asked for a special master to oversee student discipline and for a preliminary injunction prohibiting minority suspensions at a rate greater than the suspension rate of white students.

The appeals court rejected these requests, concluding that there was no evidence that the elaborate hearing structure had ever resulted in a denial of student rights. The court also concluded that differential suspension rates did not establish a *prima facie* case of racial discrimination. The court noted that the record contained no evidence of arbitrary disciplinary practices, undeserved or unreasonable punishment of black students, or failure to discipline white students for similar misconduct.

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[203] Tasby v. Estes, 572 F.2d 1010 (5th Cir. 1978); *reh'g en banc denied*, 575 F.2d 300 (5th Cir. 1978); *cert. dismissed*, Estes v. Metropolitan Branches of Dallas NAACP, 444 U.S. 437 (1980). *See* YEARBOOK 1981 at 204.

[204] Tasby v. Wright, 520 F. Supp. 683 (N.D. Tex. 1981).

[205] Tasby v. Estes, 643 F.2d 1103 (5th Cir. 1981).

The Fifth Circuit also heard a case involving the federal government's attempt to desegregate the school located at Toachapoka in Lee County, Alabama.[206] The government argued that an interdistrict remedy to desegregate the school was appropriate. The appeals court, however, questioned the appropriateness of the remedy, while admitting that the school was segregated, holding that an order for an interdistrict approach would be more suitable, based on its interpretation of *Milliken*. The appeals court therefore rejected the plaintiff's request.

A Louisiana district court considered the progress of school desegregation in Rapides Parish, Louisiana.[207] The court was asked by the federal government to consider changing its original 1971 desegregation order. After announcing that its own plan achieved the greatest degree of integration with a "reasonably assured prospect of success," the district court ruled against the government's request. The court's plan required some pupil transfers, the closing of two schools, one serving black children and one white, and that principals of certain schools be from particular races. To discourage transfers to private schools, the court ordered that transcripts be denied to parents seeking such transfers. Both sides in the case then appealed and an opinion on the appeal was recorded in 1981.

The Fifth Circuit upheld most of the lower court orders in this stormy case.[208] The appeals court decided, however, that the school closing and transcript order must be voided, first because it was not supported with enough factual evidence and second because it was improper. On other district court orders in the case, various actions taken by a state judge to impede desegregation were held to violate the instructions he received from his own state supreme court. Assorted injunctions issued by the district court against the Rapides Parish sheriff and the state were also upheld, with the court observing that continued "resistance will be perpetually fruitless."

In another dispute over a desegregation plan, a district court entered a summary judgment in favor of the federal government and ordered the school board in East Baton Rouge Parish, Louisiana, to desegregate its schools in the fall of 1981.[209] The school board had submitted what the court characterized as a "neighborhood school-voluntary magnet plan" while the government's plan was described as a "pair 'em, cluster 'em, and bus 'em plan." The court was not enchanted with either approach, and drew up its own, which it ordered the Department of Justice to monitor. The plan had the effect of eliminating all but eleven one-race elementary schools, where the system had forty-eight previously, and would provide desegregated education for 82.5 percent of the district's elementary school students. All secondary schools would be desegregated. Following the decision, it was appealed to the Fifth Circuit Court of Appeals.

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[206] Lee v. Lee Cty. Bd. of Educ., 639 F.2d 1243 (5th Cir. 1981).

[207] Valley v. Rapides Parish School Bd., 499 F. Supp. 490 (W.D. La. 1980).

[208] Valley v. Rapides Parish School Bd., 646 F.2d 925 (5th Cir. 1981).

[209] Davis v. East Baton Rouge Parish School Bd., 514 F. Supp. 869 (M.D. La. 1981).

In another case, the Fifth Circuit rejected the ruling made by a district court involving the South Park, Texas, Independent School District.[210] The district court had held that the school district was unitary and had implemented a constitutionally acceptable desegregation plan. The appeals court disagreed, finding "the evidence of record demonstrates convincingly that the defendants have failed to eliminate the continuing system-wide effects of the prior discriminatory dual system."[211] The case was remanded so that a new plan could be developed for the 1981-82 school year.

In an unusual situation where students could choose which of two public school systems to attend, a federal district court ordered that the practice be ended.[212] Students in Monroe, Louisiana, had the choice of either attending the city system, which was mostly black, or the parish system, which was largely white. The government had asked that the two systems be combined. The court, however, allowed the two district systems to continue operation so long as the choice of attendance was ended. A special master was appointed by the court to develop a reassignment plan to desegregate the city system, including the use of staff reassignments, cluster schools, boundary changes, and the like.

The Monroe case was then appealed to the Fifth Circuit.[213] The appeals court affirmed the lower court's orders, including a later decision to permit the construction of three of five schools requested by the parish school system. The appeals court also agreed that the two systems should not be combined, in spite of arguments advanced by the city board that failure to do so would result in white flight.

4.9f State Courts

Two Illinois appeals court cases addressed the legality of rules promulgated by the Illinois state board of education to encourage desegregation. The rules were set forth in response to a 1963 Illinois legislative amendment known as the Armstrong Act, which required local school districts to change their boundaries to further desegregation. In 1977 the same legislature passed an act, the Moore Amendment, which prohibited the state board from ordering busing to achieve racial balance. Against this background, the contested rules set forth by the board required each district to report annually on the racial composition of each school and would declare any district where one school had more or less than 15 percent of the minority population of the district to be in noncompliance with the Armstrong Act. If such a ruling were issued, the district could be forced to develop and implement a plan to reach the 15 percent level.

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[210] United States v. Texas Educ. Agency, 647 F.2d 504 (5th Cir. 1981). *See* YEARBOOK 1981 at 34, 199.

[211] *Id.* at 508.

[212] Andrews v. City of Monroe, 513 F. Supp. 375 (W.D. La. 1980).

[213] Taylor v. Ouachita Parish School Bd., 648 F.2d 959 (5th Cir. 1981).

The Aurora, Illinois, district challenged the rule.[214] It was upheld at the lower court level and appealed, with the system arguing that the rule was arbitrary and violated the anti-busing state amendment. The appeals court agreed, holding that the state board had the authority to issue the rules, but that the 15 percent requirement was arbitrary, and that it forced districts to bus children in violation of the Moore Amendment. The court also concluded that desegregation should be only one of several factors which must be considered by an Illinois district when setting boundaries. In addition, the court found that the state board had exceeded its authority by threatening to withhold federal funds from local districts not in compliance with the 15 percent rule. In the second Illinois case, this one involving Chicago Heights, another Illinois appeals court drew heavily on the first opinion and also invalidated the rule.[215]

A 1976 California high court case[216] requires local school districts to carefully involve local communities in developing desegregation plans. What constituted such consultation was the subject of a case decided by a court of appeal when citizens challenged a plan developed by the Oxnard, California, board.[217] The appeals court concluded that the local board had not gathered adequate information before proceeding and set forth a series of questions for the lower court to use in helping the district work toward an acceptable plan.

In a case which has previously involved open meeting issues and pending federal legislation, the Georgia Supreme Court considered a request to place the Sumter County school system under court supervision because children there were being denied "an adequate education."[218] While the lower court approved the request, based on alleged inadequate development of desegregation plans, the Georgia high court could find no rationale under state law for what it described as a proposed "take-over." The court concluded that § 1983 allowed state courts to entertain such claims for violations of federal regulations, but the provision could not be used to advance state violations. In addition, since federal litigation was proceeding, the Georgia court held that simultaneous action at the state level would be inappropriate.

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[214] Aurora East Pub. School Dist. v. Cronin, 415 N.E.2d 1372 (Ill. App. Ct. 1981).

[215] Chicago Heights Pub. School Dist. v. Illinois State Bd. of Educ., 422 N.E.2d 898 (Ill. App. Ct. 1981).

[216] Crawford v. Board of Educ. of the City of Los Angeles, 551 P.2d 28 (Cal. 1976). *See* THE YEARBOOK OF SCHOOL LAW 1977 (P. Piele, ed.) [hereinafter cited as YEARBOOK 1977] at 148.

[217] McKinny v. Oxnard Union High School Dist., 169 Cal. Rptr. 763 (Cal. Ct. App. 1980).

4.9g Attorney's Fees

Cases in this section usually hinge on whether or not a plaintiff was a "prevailing party" and therefore entitled to compensation. In 1980, a federal district court disallowed attorney's fees in the continuing litigation involving Dallas, Texas, and the plaintiffs appealed.[219] At issue was whether the fees for NAACP counsel should be paid for preparing a Supreme Court brief in the case. The Court had heard oral arguments but thereafter dismissed the writ as "improvidently granted." Fees were sought under the Emergency School Act of 1972 and 42 U.S.C. § 1988, the Civil Rights Attorney's Fee Award Act of 1976, but the resolution of the case hinged on whether the attorneys could be considered the "prevailing parties," given the circumstances of the Supreme Court action. The court of appeals found that the district court had abused its discretion in denying fees in the case and concluded that if the NAACP counsel were not compensated for the work in question, "no one will be." Even though the Court had accepted arguments and later decided against hearing the case further, the court of appeals found that the NAACP attorneys did indeed "prevail," within the meaning of § 1988.

The question of whether or not attorneys representing Hispanic students in Boston desegregation litigation were "prevailing parties" under § 1988 was contested.[220] In 1975, El Comite de Padres was permitted to intervene as a party plaintiff to protect the interests of Hispanic students, particularly regarding bilingual education. Because the Boston case was protracted in nature, the court had to face the issue of whether or not El Comite was a "prevailing party." While some of its claims involving Title VI of the 1964 Civil Rights Act clearly resulted in actions for which compensation was required, the defending school system argued that payment for Fourteenth Amendment claims should not be made. The system asserted that at no time had discrimination against Hispanics been sustained, and therefore, no fees for the equal protection claims should be made. The district court held, however, that no showing of intentional discrimination was needed, since El Comite had raised questions which were neither "frivolous nor insubstantial," pointing to the success of its Title VI claims. The court did require, however, that a detailed accounting of work be provided, including the nature of the work and the times when it duplicated the efforts of other counsel in the case.

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[218] Deriso v. Cooper, 272 S.E.2d 274 (Ga. 1980). *See* YEARBOOK 1981 at 15-16.

[219] Tasby v. Estes, 498 F. Supp. 1130 (N.D. Tex. 1980); 651 F.2d 287 (5th Cir. 1981).

[220] Morgan v. McDonough, 511 F. Supp. 408 (D. Mass. 1981).

Finally, fees were sought in a case involving the transportation of two handicapped children in the District of Columbia.[221] The issue involving transportation was settled by a stipulated agreement, but the fee question was not. The plaintiffs moved for fees under § 1988 and under the Rehabilitation Act of 1973. The district argued in response that § 504 did not contain a private right of action and that the plaintiffs' failure to exhaust administrative remedies before moving to federal court precluded payment. The district court rejected both arguments, noting that every court of appeals to rule on the issue had found a private right of action under § 504 and that it would have been futile for the plaintiffs to exhaust administrative procedures. The court also refused to find that the fees requested were excessive.

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[221] Fells v. Brooks, 522 F. Supp. 30 (D.D.C. 1981).

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TORTS

Paul W. Thurston

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5.0 INTRODUCTION

Torts is a general term used to define several independent civil causes of action based on noncontractual legal responsibilities that individuals have to avoid harming or injuring another's person, property, or reputation. The word "tort," derived from the Latin word "tortus" meaning "twisted," was at one time common in English as a general synonym for "wrong."[1] The general sense of tort as wrong suggests the difficulty involved in providing a precise definition. Prosser declines to offer a definition but does say that torts is "a body of law which is directed toward the compensation of individuals, rather than the public, for losses which they have suffered in respect of all their legally recognized interests, rather than one interest only, where the law considers that compensation is required."[2]

Torts are actually separate, independent causes of action that define a particular level of conduct that the law recognizes individuals owe one another. The more common torts have developed historically and have been recognized for centuries. Examples of these range from negligence to assault and battery to libel and slander. But tort law is not static. As society changes, it is possible for courts to define new legal responsibilities between individuals. The invasion of one's right of privacy was articulated around the turn of the century and is now a recognized tort.[3] Educational malpractice and constitutional torts represent two such emerging areas in school law.

This chapter will report the cases that have been reported during 1981 involving some type of tort claim within the school context. The cases are organized according to the particular type of tort involved. The categorization system employed will follow basically the format used in recent volumes of *The Yearbook of School Law*.

5.1 NEGLIGENCE

Negligence is the most common tort. In the lay person's mind negligence describes a type of conduct. But in a legal sense, for an injured party to secure monetary damages from another party for allegedly negligent action, the injured party will need to plead and prove, at minimum,[4] four elements.[5] Schools and their employees are not responsible as insurers for any and all injuries that occur. For liability to be present it must be shown that the school owes a particular duty to the injured person(s), that the behavior fell short of that required, that this breach was the proximate cause of the injury, that there were real injuries, and that the plaintiff was not responsible for causing the injury. Let us briefly consider the first four elements that make up the prima facie case:

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[1] W. Prosser, Handbook on The Law of Torts (4th ed. 1971).

[2] *Id.* at 6.

[3] *Id.*, ch. 20.

[4] The exact elements necessary for carrying the plaintiff's burden in the prima facie case will vary from state to state. Some states, for example, will require the plaintiff to plead an absence of contributory negligence while other states do not.

[5] *See* Prosser, note 1, *supra*, for a more detailed description of elements of the prima facie case.

1. *Duty of Due Care.* There is a duty of due care that the law recognizes one person owes to another. It requires a certain standard of conduct for the protection of others against unreasonable risks. One has a legal duty to act as an ordinary, prudent, reasonable person in the circumstances. A child is expected to conform to the standard of care of a child of like age, education, intelligence, and experience.

The duty can be specified by statute or as a matter of common law. Usually in the school context, it is not hard to show that the school (and its teachers) have a duty to protect the health and safety of the students while they are in the custody of the school.

2. *A Breach of the Duty.* This amounts to a failure of one party to conform to the standard required toward another. This can occur either from an action or an omission. The breach of the duty of due care in a specific case is a question of fact. Making a showing of this breach involves both a showing of what actually happened and a showing from these facts how the defendant acted unreasonably. Alleging failure to supervise, for example, is alleging that the teacher omitted or failed to take the appropriate action.

3. *Causation.* There needs to be reasonably close causal connection between the alleged misconduct and the resulting injury. This involves both a cause in fact relationship between the behavior and injury as well as the behavior and injury being sufficiently close in time and foreseeability.

4. *Actual Damages.* The plaintiff must show an actual loss or real damages. Nominal damages, to indicate a technical right, or the threat of future harm, not yet realized, are insufficient injury on which to bring a negligence action. Damages awarded depend upon the particular person injured.

This was recently demonstrated in an accident where a mother had the joints within the finger of her left hand fractured in a door while she was waiting for her son to be released from kindergarten. The injury occurred because of the negligence of the school. The plaintiff was an accomplished flutist, capable of playing for the Philadelphia Symphony Orchestra. Although the finger healed for normal use, because it had not healed sufficiently to give her the complete control necessary to play the flute, she could recover lost earnings, measured to be $50,000.[6]

There are two other components of the prima facie case that are basic to understanding its operation: foreseeability and the reasonable person standard. Foreseeability, which is either subsumed under the duty of due care element or the proximate cause element, means that the defendant could or should have seen the potentially dangerous consequences of the action when it was taken. This does not mean that the defendant subjectively or personally actually foresaw the potential danger. Rather, the defendant is presumed to be a reasonable person and the jury then is given instructions something like the following to determine foreseeability: "Would you, as a reasonable person, standing in the place of Y defendant at X time, have foreseen the occurrence of Z injury?" Notice that under this instruction the jury enjoys the luxury of hindsight when determining foreseeability, something which often leads to sharper vision than the defendant actually may have had. In a recent Florida case[7] in which a student was badly injured in a hazing incident held at night, the appellate court gave attention to the foreseeability aspect of proximate cause.

> If the harm that occurred is within the scope of the danger or risk attributable to defendant's negligent conduct, then it is deemed foreseeable. There are three ways in which the harm may fall within the scope of danger: First, the legislature may specify the type of harm. Second, if the same type of harm has occurred previously due to the same type of negligent conduct and the tortfeasor has actual knowledge of this, liability can be established. Third, liability can be made out if the negligence complained of has resulted in harm so frequently in the field of human experience that harm may be expected to happen again. [citations omitted][8]

The application of these legal standards depends on the particular set of facts involved. The jury usually plays the central role as fact finder for all the elements of the prima facie case. Still, the judge controls, as a matter of law, which cases involve factual allegations sufficient to go to the jury. All the cases in this chapter involve questions of law. Presumably a much greater number of cases involving school negligence that are heard at the trial court level are decided by the jury and not appealed. These cases are not reported in any systematic way and, obviously, will not be reported in this chapter.

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[6] Swartley v. Tredyffrin East Town School Dist., 430 A.2d 1001 (Pa. Super. Ct. 1981).

[7] Bryant v. School Bd. of Duval Cty., 399 So. 2d 417 (Fla. Dist. Ct. App. 1981).

[8] *Id.* at 421.

Torts, generally, and negligence, more so than other torts, are strictly a matter of state law. And, it is important to note at the outset, there is considerable variation between states in many areas of negligence law, particularly in the appropriate standard to be used for liability and the existence of immunity, to mention just two. This variation suggests that readers need to be cautious in applying a case decided in one state to another state. Extreme caution is appropriate when thinking about the precedential value of one case to another state. It is, of course, possible for a case to have precedent to another state if the same mode of analysis is applied. Determination of the existence of a duty of due care in a particular situation will often have transferability from one state to another, for example. But because of the diversity between states, both as to their statutes and earlier judicial decisions, caution is advised. It is quite possible, for example, to take the same fact situation and get quite different results in two different states because of different standards being applied.

The following section reports cases decided under a reasonable care standard according to the factual context in which they occurred. The cases reported here have satisfied the four elements of the prima facie case described above. Cases decided under other standards, most notably a willful and wanton misconduct standard, will be reported separately.[9]

5.1a Student Injuries

Schools clearly have a duty to protect the health and safety of students while they are in their charge. Consequently, when students are injured it is common to inquire whether the injury is due to a breach of this duty by a school employee. There is also a strong financial incentive to bring an action against a teacher or a school district because of the availability of money to pay the damages. Since the circumstances will determine the liability and because the circumstances vary to such a degree, it is instructive to look at the following cases reported in the past year that involved student injuries.

5.1a(1) School Settings during School Hours

In Illinois a student was injured in a high school physics class when a container, partially filled with methanol or ethyl alcohol, exploded or burst into flames.[10] The container was ignited when another student lit a match and placed it near the container. The student alleged that the container was incorrectly labeled as floor wax and also that the container was too large for the storage of this hazardous material, allowing the contents to expand into a dangerous gaseous state. The appellate court denied a motion to dismiss by the school district because the complaint was based on the theory that the school district knew, or should have known, that the container was defective and a dangerous instrumentality.

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[9] *See* text accompanying notes 75-77, *infra*.

[10] Nielsen v. Community Unit School Dist. No. 3, 412 N.E.2d 1177 (Ill. App. Ct. 1980).

Playground injuries are much more common than injuries in the regular academic classroom. Liability was found because of unsafe equipment in one case while allegations of improper supervision were rejected in several other cases.

A six-year-old, first-grade student was on the playground where she swung from the "monkey bars" to the "tether ball pole." While sliding down the pole she received a severe cut on the inside left thigh from a 1½ inch screw protruding from the pole. Based on the dangerous proximity of the pole to the monkey bars and on inadequate teacher supervision (one teacher supervising between 150 and 180 students who were doing a variety of things), the appellate court affirmed the lower court judgment of $7,500 for pain, disfigurement, and future cosmetic insurance expenses.[11] The court, however, denied recovery for mental anguish suffered by the parents, saying that such a break from precedent needed to be made by the legislature.

A sixth-grade student was injured on the school playground during a supervised recess period. The student fell and broke her elbow while engaged in an unknown game with other school children near the merry-go-round. In a suit to recover damages, the plaintiff sought to get jury instruction that the conduct of the supervising teachers on playground duty was a sufficient basis for negligence per se because the teachers' conduct violated the *Teacher's Handbook* language requiring that a playground area be made "pleasant and safe" and that "staff members on playground duty . . . be aware of what is happening on the playground at all times." The Delaware supreme court refused this interpretation because the handbook language, unlike more specific regulations promulgated for school bus design and operation under explicit legislative authority, contained no specific statement of statutory duty and there was no penalty for violation of the handbook guidelines.[12] Therefore no instruction for negligence per se was appropriate.

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[11] Gibbons v. Orleans Parish School Bd., 391 So. 2d 976 (La. Ct. App. 1980).
[12] Joseph v. Monroe, 419 A.2d 927 (Del. Super. Ct. 1980).

In a playground scuffle involving four upper elementary grade school students in which one student had his eye poked out by a ball point pen the appellate court held that there was insufficient evidence to show that the district had failed to provide proper playground supervision.[13] The playground was supervised, and the vicious conduct of one student toward another could not have necessarily been avoided with increased supervision, nor was it foreseeable.

There are a variety of circumstances in which students can be injured during the school day. Two seventh-grade students were in a fight and one student suffered a severe eye injury. The parents of the injured student brought an action against the school district and certain teachers and administrators for not providing adequate supervision. The appellate court affirmed the trial court decision dismissing the suit against the school district and its employees because they had done everything reasonably possible to supervise the students.[14] There was no reason to expect a fight between the two students, and therefore there was no duty to guard against such an attack. A judgment of $40,000 was awarded against the student who caused the injury, and the student's mother.

In a suit for negligence against the school district when glass penetrated the sneaker of a student on an outside stairway it was sufficient for the injured plaintiff to show that a general condition of debris existed on the premises for a period of time sufficient to constitute constructive notice.[15]

An eleven-year-old student was sexually molested by the school custodian on the school premises in the custodian's office. The issue before the court was whether the school district may be liable for a sexual assault committed by a school employee. The court held that, under California law, in order to hold an employer vicariously liable for the wrongful acts of its employees requires a showing that the employee acted within the scope of his employment.[16] Although the sexual assault was malicious and intentional, and took place on school grounds during the school day, it was not performed within the scope of employment because it was not required or incident to the employee's duties nor was it foreseeable by the employer. The court refused to accept a broad loss-spreading theory of liability. "[W]e invoke the doctrine of *respondeat superior* to indemnify only those losses which as a practical matter are sure to occur in the conduct of the employer's business. A sexual assault simply does not fall within the range of risks allocable to an employer."[17]

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[13] Batiste v. Iberia Parish School Bd., 401 So. 2d 1224 (La. Ct. App. 1981). *Also see* Besette v. Enderlin School Dist., 310 N.W.2d 759 (N.D. 1981) where jury verdict found a teacher and district not negligent in supervising a playground where a first-grade child fell off the side of a slide and injured her elbow.

[14] Harris v. Bogalusa City School Bd., 393 So. 2d 751 (La. Ct. App. 1980).

[15] Cooper v. Smithtown Cent. School Dist., 441 N.Y.S.2d 552 (App. Div. 1981).

[16] Whitson v. Oakland Unified School Dist., 176 Cal. Rptr. 287 (Cal. Ct. App. 1981).

A Pennsylvania case challenged the nonplacement of a handicapped child under negligence theory. A claim was made that the failure of the Philadelphia school system to process a special education placement in a private residential institution within 15 days, as directed by regulations, was negligent. The parents, based on this theory, sought reimbursement for personal payment of costs at the private school. The Commonwealth Court of Pennsylvania allowed the pleadings to be amended, but no decision was rendered on this use of a negligence action in a special education reimbursement case.[18]

Two cases were joined that involved a similar fact situation. Some high school students suffered from dyslexia, a learning disability, and were allegedly not properly diagnosed or treated at the elementary level. After some treatment at the middle school level the special programs were discontinued. The students claimed that through the negligent failure of the district to properly ascertain their condition and to provide treatment, they suffered injuries for which they should be compensated. The Alaska supreme court affirmed the dismissal of the complaint on the basis that it was not prepared to recognize this as a duty for which the district could be liable for money damages.[19]

> In particular we think that the remedy of money damages is inappropriate as a remedy for one who has been a victim of errors made during his or her education. The level of success which might have been achieved had the mistakes not been made will, we believe, be necessarily incapable of assessment, rendering legal cases an imponderable which is beyond the ability of courts to deal with in a reasoned way.[20]

5.1a(2) School Buildings

The school district allowed its gym facility to be used by the city recreation department. A youth injured while using the gym sued the school district for not providing supervision. The court held that the board of education had no liability because it had no duty toward the injured youth for supervising the activity.[21] The premises themselves were safe.

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[17] *Id.* at 293.

[18] Schobert v. Marcase, 428 A.2d 739 (Pa. Commw. Ct. 1981).

[19] D.S.W. v. Fairbanks North Star Borough School Dist., 628 P.2d 554 (Alaska 1981). This is an educational malpractice claim analyzed under duty of due care. *See* text accompanying notes 39 through 42, *infra*, for additional educational malpractice cases.

[20] *Id.* at 556.

[21] Morris v. Jersey City, 432 A.2d 553 (N.J. Super. Ct. 1981).

5.1a(3) En Route to and from School

Schools have some responsibility for the safe movement of students to and from school. The precise extent of this responsibility depends on whether busing is involved and the nature of the risk in coming to school. A number of cases were decided in this area last year.

A fifteen-year-old was hit by a car disembarking from a school bus after school. The car disregarded the bus stop light warning signals and hit the girl as she stepped onto the highway and in front of the car. The Connecticut Supreme Court affirmed both the $70,000 jury verdict against the driver and the jury verdict finding no negligence on the part of the school district and bus company.[22] There was no error by the trial court in refusing to give a jury instruction about the negligence involved in having students walk through four lanes of traffic rather than letting students out on the other side of the freeway.

In Indiana a ten-year-old student was seriously injured when struck by a bus while waiting outside a school. The appellate court affirmed a lower court jury verdict awarding over $200,000 for injuries suffered as a result of the accident.[23] Even though there was conflicting testimony over how the injury occurred, there were no teachers present at the time of the accident. The appellate court was satisfied that the school had a duty of due care to protect the students and the failure to appropriately supervise the bus stop was the proximate cause of the student's injuries.

A Louisiana school district employed a woman to transport children home from school, and the woman used her own station wagon with the knowledge of the district. An accident occurred when the station wagon stopped at the top of a hill on a state highway, with the right wheels slightly off the road. The driver, flag in hand, got out the left front door and the ten-year-old passenger out the right front door and walked around the front of the car. Normally the driver would escort the student across the highway. On this particular day the driver, startled by an approaching car coming up the hill, jumped back into the car. The student, confused and frightened, was seriously injured when struck by the oncoming car as she attempted to cross the highway alone. The trial court dismissed the suit against the driver and the school district. The appellate court reversed on both counts.[24]

The conduct of the driver amounted to negligence per se. The bus driver, although driving her own unmarked car, is responsible for exercising the highest degree of care for her passengers. Because she did not pull the car completely off the highway, in violation of state statute, and because she was driving an unmarked car, this conduct amounts to negligence per se. (The significance of negligence per se is that it satisfies the duty and breach of duty requirement in the prima facie case.)

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[22] Josephson v. Meyers, 429 A.2d 877 (Conn. 1980).

[23] School City of Gary v. Claudio, 413 N.E.2d 628 (Ind. App. Ct. 1980).

[24] Robertson v. Travis, 393 So. 2d 304 (La. Ct. App. 1980).

In Maryland, a sixteen-year-old decided to ride home from school with a friend and fellow student, rather than take the school bus, and was seriously injured in an accident when the driver of the car collided head-on with another car while attempting, improperly, to pass a school bus. The mother brought a suit against the district on, basically, two different theories. First, the mother claimed that the state statute required the district to provide safe transportation home, and if the student wanted to get home some other way the parents would need to be notified. Second, the school was allegedly negligent in allowing the student to ride home with his friend when it knew that the driver was reckless. The appellate court dismissed the action, saying that there was no duty the school owed in this particular situation.[25] First, the applicable statute that required the board to "arrange for the transportation of students" merely authorized the district to organize a bus system and did not require that buses be the sole means of transportation. Second, the school had no duty to the injured student unless it could be alleged that the school officials had reason to know that the student driver was careless and that they could have prevented the other student from riding with him.

Two other transportation-related cases were remanded to the trial courts.[26]

5.1a(4) School-Related Activities

Student injuries frequently occur in school-related activities.[27] During this past year all but one of the reported cases in this area involved a sports-related activity. In a Pennsylvania case a football player suffered a detached retina when a finger was stuck in his eye during the course of a touch football game. This touch football game was between members of the varsity football team without normal equipment, and the rules were looser than usual touch football. Nonetheless, the Pennsylvania superior court was satisfied that certain rules controlled the conduct of the game, and that the injured plaintiff knew the potentiality for injury before he joined in the game and was therefore barred from recovery by his assumption of the risk that resulted.[28]

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[25] Collins v. Board of Educ. of Kent Cty., 426 A.2d 10 (Md. Ct. Spec. App. 1981).

[26] Padgett v. School Bd. of Escambia Cty., 395 So. 2d 584 (Fla. Dist. Ct. App. 1981) (principal's alleged negligence in voluntarily operating flashing lights at a school crossing actionable); Nance v. State Bd. of Educ., 285 S.E.2d 848 (S.C. 1981) (wrongful death action and personal injuries suffered by parents as result of daughter's death in a school bus accident remanded for trial on merits).

[27] Hagenau, *Penumbras of Care Beyond the School House Gate*, 9 J. L. & EDUC. 201 (1980). (This article deals with the school's liabilities that befall students when injured away from school. The author explores injuries occurring during unexcused absences, school authorized errands, mandatory outings, school sponsored transportation and by suspended students.)

On appeal, the Pennsylvania supreme court reversed and remanded this decision.[29] The court held that it was an error to not allow the testimony of a former football coach as an expert witness regarding the league safety requirements and whether the present coaches were complying with them. Second, the lower court failed to consider the allegations in the best light for the plaintiff in deciding that a question of negligence could not be shown. On the contrary, the supreme court thought that a touch football game that involves tackling and body blocking, that is initiated and supervised by the football coaches, in which no equipment is used, and which is played by team members attempting to impress coaches who are themselves engaged in the game, presents a jury question as to the dangerousness of the game and the negligence of the coaches. Finally, the lower court erred in finding the plaintiff barred from recovery by assuming the risk of the injury that occurred in the "jungle" football game.[30]

A person was injured when hit by a foul ball while watching a high school baseball game. The person was standing behind the three foot fence parallel to the third base foul line. The school district had a fenced back stop behind home plate which protected the bleachers behind home plate. A three foot high fence ran for sixty feet down the first and third base lines. The jury decided that the plaintiff had suffered injuries amounting to $100,000, and this amount was assessed in comparative negligence 65 percent to the district and 35 percent to the plaintiff. This verdict was affirmed on first appeal and then reversed by the New York Court of Appeals (court of last authority).[31]

The court held that the school district had a duty to provide screening for the area of the field behind home plate where the danger of being struck by a ball is the greatest and that the amount of the screening must be sufficient to provide adequate protection for as many spectators as may reasonably be expected to desire such seating in the course of an ordinary game. Because the district met this standard and the injured spectator decided to stand down the third base line rather than sit in the protected stands, the district had met its duty and was not responsible for additional protective screening.

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[28] Rutter v. Northeastern Beaver Cty. School Dist., 423 A.2d 1035 (Pa. Super. Ct. 1980).

[29] Rutter v. Northeastern Beaver Cty. School Dist., 437 A.2d 1198 (Pa. 1981).

[30] *See* text accompanying note 59, *infra*, for additional discussion of this case.

[31] Akins v. Glens Falls City School Dist., 424 N.E.2d 531 (N.Y. 1981).

A school sponsored club held an initiation ceremony after school in which, contrary to school regulations, a hazing ceremony was conducted. The faculty sponsor was not at the meeting. During the hazing ceremony a student and prospective club member suffered an injury involving severance of his spinal cord. The Florida court of appeals held that the board of education rules governing student clubs, the reputation the club had for violating school rules, the failure of a school advisor to be present, and the requirement to get a principal's permission for the meeting provide a basis for finding a duty that the school district has toward the injured student in the operation of these clubs.[32]

The Louisiana High School Athletics Association requires physical examinations by a doctor before students can participate in football. The high school had arranged for free medical examinations to be given at a certain time at a doctor's office away from the school. While returning from the examination, two students were injured in an automobile accident, and an action was brought against the school district on the theory that the district had failed to provide safe transportation to the doctor's office. The appellate court affirmed the motion to dismiss on the grounds that the district had no such duty to transport the students.[33]

5.1b Nonstudent Injuries

School districts have a duty of reasonable care to teachers and other adults. There have been a number of cases in this area during the past year.

Plaintiff was a teacher employed by the Louisiana department of education as a teacher of vocational education skills at a technical school in a program funded by the Comprehensive Employment Training Act (CETA). The program she worked in was administered by Manpower Programs for Parish of Jefferson. She worked in a detached trailer behind the school. The teacher brought action for injuries sustained when she slipped and fell on school grounds (in a doorway area where a puddle of water had formed during a storm). Plaintiff sued the trailer owner (Elder), Parish of Jefferson School, and Manpower Programs of Jefferson (local CETA). Manpower and Jefferson School moved for and were granted summary judgment. The teacher appealed because there was a genuine issue of material fact as to legal obligation owed by defendants. The court of appeals affirmed summary judgment for defendants.[34] The court held that neither Jefferson Parish nor the local CETA parish program (Manpower) owed duty to protect the teacher against accumulation of water or sleet by a school building where the operations, maintenance, and repair of the structures were handled and funded by the state. Neither parish nor Manpower was the teacher's employer and neither could be liable for injuries sustained in the doorway.

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[32] Bryant v. School Bd. of Duval Cty., 399 So. 2d 417 (Fla. Dist. Ct. App. 1981).

[33] Rawls v. Dugas 398 So. 2d 630 (La. Ct. App. 1981).

A mother of a kindergarten student was injured when her finger was crushed in a door jam while waiting for the student to be dismissed. The school had breached its duty of due care because of the unsafe, crowded conditions in which the parents had to wait.[35]

An Illinois appellate court affirmed a summary dismissal of an alleged negligence action against a high school district by a woman who slipped on ice near the building because the woman could not show affirmatively that the patch of ice on which she fell was an artificial accumulation caused by the district.[36]

The Oregon Supreme Court used the facts of a case reported last year[37] to refine the concept of active versus passive negligence. The case involved a cafeteria worker who was on medical leave of absence, and therefore not employed by the district, who was injured by activities in a gym class while she was walking through the gym class after meeting with several friends. The appellate court dismissed the case on the grounds that the injured former employee was a licensee who was at the school for social reasons, and the duty owed to a licensee by the school district is to avoid injuring the person through active negligence. The Oregon Supreme Court reversed saying that the trial court misunderstood the concept of "active" and "passive" negligence.[38] Rather than equate "active negligence" with commission and "passive negligence" with omission, the Oregon Supreme Court prefers to state the rule in terms of conditions upon or within the premises as contrasted with activities carried on upon the premises. In this case where the activities were being conducted in school and the former employee was lawfully on the premises the district had a duty to exercise reasonable care in the conduct of the gym class. Although the court refused to abrogate the invitee-licensee distinction as a matter of law, it certainly down played this distinction in holding the district liable for injuries incurred by someone walking through a gym class that was not appropriately supervised.

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[34] Mathews v. Elder International, 400 So. 2d 251 (La. Ct. App. 1981).

[35] Swartley v. Tredyffrin East Town School Dist., 430 A.2d 1001 (Pa. Super. Ct. 1981).

[36] Bedeker v. School Directors of Dist. No. 40, 416 N.E.2d 68 (Ill. App. Ct. 1981).

[37] THE YEARBOOK OF SCHOOL LAW 1981 (P. Piele, ed.) at 222.

[38] Ragnone v. Portland School Dist. No. 1J, 633 P.2d 1287 (Or. 1981).

5.2 EDUCATIONAL MALPRACTICE

Educational malpractice is a negligence claim that has received considerable public attention. The notion behind educational malpractice, simply put, is to place a duty on the school to provide that standard of education appropriate for the grade level of the particular child. It is a popular topic with legal commentators,[39] though to date it has not fared well in the courts. This trend continued through this past year.

The Maryland court of special appeals affirmed the trial court in dismissing an educational malpractice suit brought against the public school district and several teachers.[40] After reviewing case law from other states the appellate court refused to recognize educational malpractice as an actionable claim for public policy reasons. The court feared that venturing into this area would involve the judiciary becoming too intimately involved in educational decisionmaking.

> The courts, on constitutional grounds, can decide that all schools must afford equal protection of the laws, but courts may not decide the curriculum, nor the degree of proficiency needed to advance from grade to grade through the school system. The field of education is simply too fraught with unanswered questions for the courts to constitute themselves as a proper forum for resolution of those questions.[41]

A second educational malpractice claim was dismissed in New York.[42]

5.3 NEGLIGENCE DEFENSES

Even if the injured plaintiff can satisfy the prima facie case, the defendant teacher or school district or administrator still has a number of defenses available to overcome the claim. These defenses range from immunity—either common law sovereign immunity or statutory immunity—to the more usual affirmative defenses to the introduction of a different standard of liability. The reader should be alert to the divergent motivations underlying these defenses. Immunity, for example, limits the flow of public money to private citizens because liability payments will detract from the educational functions of the schools, whereas the affirmative defenses keep the plaintiffs from recovering for behavior that in some way was responsible for the injury that occurred.

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[39] Pabian, *Educational Malpractice and Minimal Competency Testing*, 15 NEW ENG. L. REV. *Nonliability for Negligence in the Public Schools*, 55 LAW. 814 (1980); Garber, *Damages Actions for Denial of Equal Educational Opportunities*, 45 MO. L. REV. 281, 283-88 (1980); Tracy, *Educational Negligence*, 58 N.C. L. REV. 562 (1980); Jerry, *Recovery in Tort for Educational Malpractice*, 29 U. KAN. L. REV. 195 (1981).

[40] Hunter v. Board of Educ. of Montgomery Cty., 425 A.2d 681 (Md. Ct. Spec. App. 1981).

[41] *Id.* at 685.

[42] Washington v. City of New York, 442 N.Y.S.2d 20 (N.Y. App. Div. 1981).

5.3a Immunity

5.3a(1) Common Law (Governmental) Immunity

A quarter of a century ago, tort liability in public schools was almost nonexistent because of sovereign immunity enjoyed by the state. Sovereign immunity has eroded to a great extent—though it still exists in several states. In many states the courts have abolished sovereign immunity[43] or the legislatures have abolished it[44] or passed some substitute form of statutory immunity. Numerous cases reported in 1979 involved one of these immunity defenses.

The South Dakota Supreme Court affirmed a summary judgment dismissing a negligence suit against a school district in which a student had been injured in a required physical education class.[45] The court refused to remove sovereign immunity of school districts without legislative authorization. The scope of such sovereign immunity is captured in the court's quotation from a 1913 decision.

> A school district officer in the performance of his duties acts in a political capacity, as much so as the governor of a state, and is not liable for negligent acts of omission occurring in the performance of such political or public duties, unless the sovereign power of the state has authorized and consented to a suit for such negligence.[46]

Decisions in two other states routinely applied sovereign immunity to bar negligence actions against the districts.[47]

A recurring issue involves the applicability of sovereign immunity in a situation where the injury occurred before and is now being litigated after the abolition of sovereign immunity.

A student, injured on a trampoline in a physical education class, brought a personal injury suit against the school district and against two physical education instructors alleging negligence of supervision. The Missouri Supreme Court affirmed the court of appeals in dismissing the suit against the school district because it was barred by sovereign immunity.[48] Even though the doctrine of sovereign immunity had been abrogated by another Missouri Supreme Court decision,[49] the trampoline injury at issue here occurred before the effective date of this decision, and sovereign immunity still applied to the district. The prospective abrogation of the doctrine does not violate equal protection. Sovereign immunity does not extend, though, to the actions of individual teachers. Consequently, the supreme court remanded the case to allow plaintiffs to amend their pleadings, stating the inappropriate action of the teachers that led to the injuries on the trampoline.

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[43] Claymont School Dist. v. Beck, 424 A.2d 662 (Del. 1980).

[44] Comment, *The Kansas Tort Claims Act and School Districts*, 28 U. KAN. L. REV. 619 (1980). (This article provides an overview of the Kansas Tort Claims Act—effective July 1, 1979—which replaced sovereign immunity. Like tort claims acts in other states the statute imposes liability on government units unless one of fifteen exceptions applies.)

[45] Merrill v. Birhanzel, 310 N.W.2d 522 (S.D. 1981).

[46] *Id.* at 522.

[47] Holloway v. Dougherty Cty. School Sys., 277 S.E.2d 251 (Ga. Ct. App. 1981). (Student injured when a milk crate she was standing on to get a drink turned over.); Tucker v. Kershaw Cty. School Dist., 279 S.E.2d 378 (S.C. 1981). (Student assaulted by another student during recreation class period.)

An injury to a student hit by a car when the student was crossing the highway from an unmarked car occurred prior to the abolition of sovereign immunity in Louisiana. Precedent requires the interpretation that sovereign immunity is barred at the time of this suit regardless of the law at the time of the injury. Consequently the district is jointly liable with the driver's insurance company because of its vicarious liability for the negligence of its employee.[50]

5.3a(2) Statutory Immunity

There are a variety of ways in which a statute can limit liability of a school district. One is to put a monetary limit on the maximum claim that a successful plaintiff can recover. For example, the Oregon Tort Claims Act places a $100,000 ceiling on each claimant arising out of a single accident. This limitation was held to control in a situation where the death of a student on a school bus was the basis of a jury returning a $300,000 verdict against the school district when the district was covered by over $1,000,000 of insurance.[51]

Another way is to provide governmental immunity generally with specific statutory exceptions allowed. In Texas, school districts enjoy governmental immunity except where injuries and damages arise from the use of motor vehicles. The limits of this exception were tested in a recent case in which one brother was killed and another injured when a fight erupted in the rear of a school bus while dropping students at a junior high school. A person who was not a student at the time pulled a butcher knife and stabbed one of the brothers to death. The appellate court affirmed the trial court in holding that this fact situation did not fall within the exception to governmental immunity because the injury arose out of the failure to control and supervise the public, not from the operation or use of a motor vehicle.[52]

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[48] Spearman v. University City Pub. School Dist., 617 S.W.2d 68 (Mo. 1981).

[49] Jones v. State Highway Comm'n, 557 S.W.2d 225 (Mo. 1977).

[50] Robertson v. Travis, 393 So. 2d 304 (La. Ct. App. 1980).

[51] Espinosa v. Southern Pacific Transp. Co., 624 P.2d 526 (Tex. Civ. App. 1981).

A third way to limit liability is to make the employee liable only for willful and wanton misconduct. A recent Florida case involved a constitutional challenge to the timing implications of such a statute. During the 1980 legislative session the Florida legislature passed an amendment which bars any suit against a governmental employee unless that employee has acted with a willful or wanton disregard of one's human rights, safety, or property, or in bad faith, or with malicious purpose. The amendment was made applicable to all actions pending before trial or appellate courts on July 1, 1980. The appellate court held this retrospective application of the amendment violated the Florida constitution because a vested right was affected.[53]

There is a flurry of litigation in Michigan testing the limits of the immunity there. A fifteen-year-old high school student was injured in the first of a scheduled series of weightlifting training sessions in preparation for football tryouts when he attempted to lift a 250 to 300 pound weight and he fell. He was allegedly urged beyond his limits by the coach. The state appellate court had to determine the limits of the governmental immunity statute, which stated "except as in this act otherwise provided, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function." The court had to determine the extent to which this statutory immunity extends to individual agents or employees. The injured student sued the athletic director, the high school principal, and the district superintendent, as well as the coach, for being negligent in supervising the weightlifting program. The court held that where the individual had no discretionary authority over the incident, the immunity statute would apply.[54] Consequently, the suit against the superintendent was dismissed. But individuals like the principal and athletic director, who had discretionary authority over the operation of the weightlifting program, were held to be not covered under the immunity statute. Finally, the court held that the condition of the building was not a reason for the injury and therefore did not open the district to liability under this exception to the statute.

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[52] Estate of Garza v. McAllen Indep. School Dist., 613 S.W.2d 526 (Tex. Civ. App. 1981).

[53] Bryant v. School Bd. of Duval Cty., 399 So. 2d 417 (Fla. Dist. Ct. App. 1981).

[54] Vargo v. Suitchan, 301 N.W.2d 1 (Mich. Ct. App. 1980).

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A public school district was held to be involved in a governmental activity and was therefore covered by Michigan's governmental immunity statute.[55] Consequently a suit by a student injured in a wrestling exercise in a physical education class was barred from bringing a negligence action against the school district or the teacher working in his official capacity.[56]

A student resident of the Michigan School for the Deaf sued the state on the claim that negligence of the school administrators was the reason for injuries suffered from a beating given him by two other students in the school. The court of appeals held that the residential operation of the school was sufficiently related to the educational operation of the school to be characterized as a governmental function and therefore entitled tt immunity.[57]

The Pennsylvania Tort Claims Act provided the basis for barring a negligence action there.[58]

5.3b Other Defenses

5.3b(1) Assumption of Risk

In a previously mentioned case, a high school boy suffered a severe eye injury in a jungle football game being conducted as part of training exercises for the football team. In this case the trial appellate courts held that the boy had assumed the risk of the eye injury by participating in the game and was consequently barred from recovery. The Pennsylvania Supreme Court has made an exhaustive analysis of the doctrine of assumption of risk and concluded that the lower courts erred for several reasons.[59] First, there is contradictory evidence about what actual knowledge of possible injury the boy had. The test is not what the reasonable person should have known, but is rather a subjective test of what the person actually believed. Second, voluntariness is a necessary element in the affirmative defense of assumption of risk. In this instance, there are some serious questions about the extent to which the boy's participation in the game was voluntary and therefore the directed verdict was inappropriate. The matters of voluntariness and actual knowledge were close enough that they should have gone to trial and the jury should have been allowed to decide the matter according to the facts. The supreme court then used this occasion to severely restrict the assumption of risk doctrine. Concerned about the difficulty of defining risk and its overlap with the duty of care owed and one's own contributory negligence, the doctrine of assumption of risk was abolished except where specifically preserved by statute or where express assumption of risk exists or where a case is brought under a strict liability theory.[60]

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[55] Deaner v. Utica Commun. School Dist., 297 N.W.2d 625 (Mich. Ct. App. 1980).

[56] *See also* Churilla v. School Dist. for City of East Detroit, 306 N.W.2d 381 (Mich. Ct. App. 1981) (injury of a junior high student in football practice); Everhart v. Board of Educ. of Roseville, 310 N.W.2d 338 (Mich. Ct. App. 1981); Smith v. Mimnaugh, 306 N.W.2d 454 (Mich. Ct. App. 1981) (school crossing guard); Bush v. Oscado Area Schools, 311 N.W.2d 788 (Mich. Ct. App. 1981) (dangerous classroom environment for science experiment alleged).

[57] Rouse v. State, 311 N.W.2d 144 (Mich. Ct. App. 1981).

[58] Wimbish v. School Dist. of Penn Hills, 430 A.2d 710 (Pa. Commw. Ct. 1981).

[59] Rutter v. Northeastern Beaver Cty. School Dist., 437 A.2d 1198 (Pa. 1981).

The doctrine of assumption of risk is eliminated when a state uses a comparative negligence scheme for allocating liability. The significance of this is borne out in a recent New York Court of Appeals case in which a spectator was injured by a fly ball at a high school baseball game. Under assumption of risk, the spectator would have been barred from recovery, but under the comparative negligence doctrine, the liability was proportioned between the plaintiff and the school district. The court of appeals analyzed the duty owed to find that the district did not owe any more protection to the spectator than had been provided, and therefore barred the recovery.[61]

5.3b(2) Contributory Negligence

In the previously mentioned Louisiana case in which a ten-year-old was injured by a car while crossing the highway from an unmarked school district car, the defendants argued that the girl was contributorily negligent. Although the law is clear that a nine- or ten-year-old child can be contributorily negligent—measured by the self-care expected of a child of similar age, intelligence, and experience—this particular child was not contributorily negligent because she was a less than average student. In addition, the child did not know the area very well because her family had lived at this location only three weeks and the child, was, therefore, reliant on the driver. Finally, the nature of the sudden emergency—an unexpected oncoming car and disappearance of the driver—would be an unusual circumstance that would explain behavior divergent from what one would expect under less strained circumstances.[62]

In the Indiana case where a ten-year-old was injured by a school bus at a bus stop, the defendant's school district alleged contributory negligence, but the court refused to accept it given the circumstances. "When the children's limited experience with buses is combined with the natural tendencies of ten-year-olds to run and play, it cannot be said that the jury's resolution of the contributory negligence question is contrary to law."[63]

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[60] *Id.* at 1209-10 n.5. Note the 19 other jurisdictions which have seriously modified or abolished the assumption of risk doctrine. These states include Alaska, California, Delaware, Hawaii, Idaho, Iowa, Kansas, Kentucky, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, North Carolina, Oregon, Texas, Washington, Wisconsin and Wyoming.

[61] Akins v. Glens Falls City School Dist., 424 N.E.2d 531 (N.Y. 1981).

[62] Robertson v. Travis, 393 So. 2d 304 (La. Ct. App. 1980).

In another Louisiana case the court accepted the contributory negligence defense based on the conduct of a twelve-year-old. Action was brought by the plaintiff and on behalf of his twelve-year-old son to recover damages for personal injuries against the physical education teacher at school, the parish school board, and the school board's disability insurer. During physical education class, the twelve-year-old plaintiff and other boys left gym to conduct a foot race in an adjoining hallway out of the sight of the teacher. This was done without the teacher's permission or knowledge and violated his class rules. The boys knew this. The plaintiff crashed into a glass window and fell to the ground outside. He suffered severe lacerations to arms and legs. The trial court held for all defendants. The court of appeals held that the physical education teacher had fulfilled his duty toward plaintiff's son and so he was not negligent. Even though the school board was negligent in failing to replace the glass panel with safety glass, despite the obvious danger it presented, the school board was not liable for injuries because the twelve-year-old, who was a boy of normal intelligence and maturity for his age group, was contributorily negligent in disobeying the safety rule to stay in gym and in pushing against the glass panel.[64]

5.3b(3) Statute of Limitations

Some states limit claims against school districts by placing a more restrictive statute of limitations on the initiation of a suit. Application of such a statute was involved in a recent case.

The action against the driver and the insurance company of the driver for wrongful death liability was dismissed because it was not timely filed within the applicable four-year statute of limitations.[65]

5.3b(4) Notice of Claim

Certain states require that plaintiffs provide a notice of claim within a specified period of time if they intend to bring a suit against the district. This allows the district a chance to protect the evidence surrounding the incident, thereby making it less vulnerable to frivolous suits. Several cases from New York involve extension of time beyond the statutory period.

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[63] School City of Gary v. Claudio, 413 N.E.2d 628, 633 (Ind. App. Ct. 1980).

[64] Wilkinson v. Hartford Accident and Indemnity Co., 400 So. 2d 147 (Fla. Dist. Ct. App. 1981).

[65] School Bd. of Broward Cty. v. Surette, 394 So. 2d 147 (Fla. Dist. Ct. App. 1981).

Under the New York notice statute, it is possible to file a late notice of claim where actual notice to the school district of the student's injury was established and there was no showing that school district would be prejudiced by late filing.[66]

An extension was not allowed when a five-year period of time had elapsed without actual notice to the New York Board of Education.[67] The City of New York had been notified, and although both the city and board of education are represented by the corporation counsel, this is not sufficient to suspend (toll) the statute.[68]

The New York Court of Appeals had an opportunity to provide an interpretation of a statutory revision in the notice of requirement.[69] The one-year limitation period was changed to allow more flexibility by the court in determining the time extension in the notice requirement. Several issues were involved. First, the court treated the revision as having a limited retrospective effect so that it could be applied to situations that occurred somewhat before the revision was passed. Second, the period specified in the revised statute during which a court may authorize service of a late notice of claim is co-extensive with the time limited for commencing an action against a public corporation. Consequently, the status of the plaintiff as a minor is not sufficient, in itself, to be the basis of an automatic extension of time until majority is reached, but is simply one of the variables the court can consider in applying its discretion to extending the notice period.[70]

In New York, a case brought by four teachers against the school district's termination of their employment was dismissed because of failure to file a timely notice of claim. Dismissal, however, was reversed by the New York Supreme Court, Appellate Division.[71] The court held that the matter at issue sought to vindicate a public interest, and therefore fell within an exception to the notice requirement. Even if this exception did not exist, the fact that the notice of claim was given within three months of effective date of termination would satisfy the notice requirement.

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[66] Lockskin v. South Colonie Cent. School Dist., 439 N.Y.S.2d 505 (N.Y. App. Div. 1981).

[67] Gold v. City of New York, 437 N.Y.S.2d 973 (N.Y. App. Div. 1981).

[68] *See also* Florence Development Corp. v. Board of Educ. of New York, 439 N.Y.S.2d 40 (N.Y. App. Div. 1981).

[69] Cohen v. Pearl River Union Free School Dist., 414 N.E.2d 639 (N.Y. 1980).

[70] Cohen v. Pearl River Union Free School Dist., 439 N.Y.S.2d 393 (N.Y. App. Div. 1981). (On remand the appellate division could not tell whether the district had received actual notice of the accident upon which claim was based within 90 days of occurrence and ordered the matter remitted to special term for determination *de novo*.)

[71] Feinberg v. Board of Educ. of East Ramapo School Dist., 433 N.Y.S.2d 39 (N.Y. App. Div. 1980).

In a case from Oregon a student injured in an automobile accident in 1978 sought to sue the school district and county for damages resulting therefrom.[72] Oregon has a notice statute[73] that requires that anyone suing a public body or public official for a personal injury suit must

> present . . . to the public body within 180 days after the alleged loss or injury a written notice stating the time, place and circumstances thereof, the name of the claimant and his representative or attorney, if any, and the amount of compensation or other relief demanded.

The plaintiff failed to comply with the statutory requirement that the notice be either personally served or mailed by certified mail. Because the plaintiff mailed the letter first class he claimed that this is substantial satisfaction of the notice statute. The Oregon Court of Appeals rejected this argument and also rejected an argument that the statutory provision was unconstitutional. The purposes of the statute are reasonable in that they provide public bodies an opportunity to promptly investigate the merits of a claim and to aid in obtaining liability insurance protection and adjusting claims.

5.3b(5) Comparative Negligence

The Illinois Supreme Court, by judicial decision, replaced contributory negligence with the pure form of comparative negligence in which plaintiff's damages are simply reduced by the percentage of fault attributable to him.[74]

5.3c Use of a Different Liability Standard

The reasonable care standard has been used as the mode of analysis in those circumstances in which immunity does not foreclose suit all together. Several cases from Illinois have employed a different standard —a willful and waton misconduct standard—for alleged negligence in those situations in which a teacher has a supervisory relationship with students. Two present cases involve the court's articulation of when the willful and wanton misconduct standard applies and when the reasonable care standard applies.

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[72] Brown v. Portland School Dist. No. 1, 617 P.2d 665 (Or. Ct. App. 1980).

[73] *Id.* at 666, Or. Rev. Stat. § 30.275(1).

[74] Alvis v. Ribar, 412 N.E.2d 886 (Ill. 1981). This case provides a scholarly review of the concept of comparative negligence documenting its status in 36 states which recognize it and distinguishing between the pure and modified forms.

In one case a student had septicemia in a knee as a result of an injury received off school property during an activity unrelated to school. The student sued the school district because two teachers and a student allegedly treated the knee inappropriately at school, causing permanent injury. The Illinois Supreme Court denied dismissal of the suit. The court said that allegations of negligence on the part of the teachers were sufficient because this activity is not connected with the school program and is therefore outside of the willful and wanton standard applied to alleged teacher misconduct that involves student discipline.[75]

A member of the girls' softball team slipped off the trunk of a car she was riding on prior to the beginning of softball practice, and she suffered head injuries. This occurred five minutes before the scheduled start of practice, and the coach arrived seconds after the injury occurred. The girl claimed that the school district, in requiring the teacher-coach to stay at school until the end of the contracted period, committed willful and wanton disregard for the safety of the pupils. The appellate court rejected this argument, and affirmed summary judgment dismissing the suit against the school district because there weren't sufficient facts to show either reckless or intentional disregard of pupil safety by having the teacher satisfy her contractual duties at school before going to softball practice.[76]

In Georgia the appellate court articulated the exception to the general rule of sovereign immunity: an individual can be liable for acts done within the scope of the official's discretionary authority when done in a willful, malicious, or corrupt manner.[77]

5.4 LIABILITY INSURANCE

As previously mentioned, when an Oregon district held liability insurance in excess of a ceiling set by law for payment of claims, the Oregon Supreme Court held that the excess coverage did not amount to a waiver of its sovereign immunity to the extent of its excess coverage.[78] In a companion case, the Oregon Supreme Court said that the subjective intent of the school district in procuring the additional coverage was irrelevant.[79]

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[75] O'Brien v. Township High School Dist. No. 214, 415 N.E.2d 1015 (Ill. 1980).

[76] Pomrehn v. Crete-Monee High School Dist., 724 N.E.2d 1387 (Ill. App. Ct. 1981).

[77] Holloway v. Dougherty Cty. School Sys., 277 S.E.2d 251 (Ga. Ct. App. 1981).

[78] Espinosa v. Southern Pacific Transp. Co., 635 P.2d 638 (Or. 1981).

[79] Southern Pacific Transp. Co. v. School Dist. No. 40, 635 P.2d 645 (Or. 1981).

The South Dakota Supreme Court refused to recognize the school district's purchase of liability insurance, which is authorized by statute as allowing a waiver of school district immunity.[80] The court desires a more explicit legislative authorization for allowing such a waiver.

The Florida Appellate Court held that the school district's general insurance policy carrier was liable for the costs associated with the death of a student killed by a car while waiting at the bus stop.[81] The policy's exclusion of liability for any injuries occurring from a motor vehicle owned or operated by the district did not apply to the facts of this case.

5.5 ASSAULT AND BATTERY

Assault and battery are usually talked about together although they actually are two separate intentional torts. Battery is an intentional and unpermitted touching of another while assault is an act of putting another in fear of the touching.[82] Assault and battery suits in the public school context usually involve corporal punishment.

A music teacher grabbed a twelve-year-old boy, who, with three other boys, had been improvising sounds in a song which the class was supposed to sing in unison. Without a cautioning statement, the teacher grabbed the student, threw him from his chair into a movable chalkboard and then took him into the hall where he swung the boy by his arm into the wall. Although the teacher is authorized to use reasonable means of disciplining students, including corporal punishment, the power to punish does not include punishment which is disproportionate to the offense, unnecessarily degrading or likely to cause serious or permanent harm. The Connecticut Supreme Court held that the teacher was liable for the displaced fracture of the clavicle that the student suffered because it was excessive and unnecessary.[83]

5.6 CONSTITUTIONAL TORTS

By a logical extension of case law in which the Supreme Court has expanded the potential liability of municipalities (and boards of education) for depriving persons of constitutional[84] or federal statutory[85] claims, the Supreme Court faced the issue of the legality of punitive damages under a § 1983 claim.[86] In *City of Newport v. Fact Concerts*,[87] the Supreme Court held that punitive damages are not available under a § 1983 claim. This was based on both the history of § 1983 and policy considerations. The Supreme Court found that Congress did not have any intention of doing away with the common law immunities afforded municipalities. Traditionally, immunity from punitive damages extended to municipalities. The court noted that "judicial disinclination to award punitive damages against a municipality has persisted to the present day in the vast majority of jurisdictions."[88] The social policy objectives intended in awarding punitive damages are difficult to accomplish when awarded against a city and not an individual. A punitive damage award against a municipality would likely be accompanied by an increase in taxes or reduction in services for the citizens who would be actually paying the award.

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[80] Merrill v. Birhanzel, 310 N.W.2d 522 (S.D. 1981).

[81] School Bd. of Broward Cty. v. Surette, 394 So. 2d 147 (Fla. Dist. Ct. App. 1981).

[82] *See* PROSSER, note 1, *supra*, Section 9, at 34-41.

[83] Sansone v. Bechtel, 429 A.2d 820 (Conn. 1980).

[84] Monell v. New York City Dept. of Social Servs., 436 U.S. 658 (1978). Owen v. City of Independence, 445 U.S. 622 (1980) extends this liability and denies immunity to the governing body even if the action was taken in good faith.

[85] Maine v. Thibotout, 100 S. Ct. 1398 (1980).

> Because abolute immunity from such damages was obtained at common law and was undisturbed by the 42nd Congress, and because that immunity is compatible with both the purposes of Section 1983 and general principles of public policy, we hold that a municipality is immune from punitive damages under 42 U.S.C. Section 1983.[89]

5.6a Student-Initiated Cases

Improper placement of a student was challenged under the Education for All Handicapped Children Act (P.L. 94-142), and the court held that school district placement was improper.[90]

The court denied monetary damages and attorney fees, since neither are authorized under the statute. With little discussion, the court refused to authorize 42 U.S.C. § 1983 to reach so far as to cover this type of damages.

5.6b Employee-Initiated Cases

In one case, the district court refused to strike plaintiff's claim for punitive damages against the school district.[91] The *City of Newport* decision refusing punitive damages was based on a § 1983 claim and is distinguishable from a § 1981 claim that bars racial discrimination and has been the source of authority for reaching racial discrimination in public schools, on occasion. The district court refused to equate the liabilities or immunities of §§ 1981 and 1983. Consequently, the plaintiff will be allowed to show that punitive damages under § 1981 are appropriate.

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[86] For a more detailed description of the development of the constitutional tort, *see* THE YEARBOOK OF SCHOOL LAW 1980 (P. Piele, ed.) at 260-67 and THE YEARBOOK OF SCHOOL LAW 1981 (P. Piele, ed.) at 226-29.

[87] 101 S. Ct. 2748 (1981).

[88] *Id.* at 2756.

[89] *Id.* at 2762.

[90] Hines v. Pill Cty. Bd. of Educ., 497 F. Supp. 403 (E.D.N.C. 1980).

[91] Boyd v. Shawnee Mission Pub. Schools, 522 F. Supp. 1115 (D. Kan. 1981).

In a case involving the extent of damages against individual board members responsible for a maternity leave policy that violates Title VII the court held that individual disability had to be based on constitutional standards, and since there was no clear constitutional standard at the time the policy was passed, the defendants enjoyed a qualified immunity and could not be held personally liable.[92]

The Tenth Circuit Court of Appeals, in an earlier decision, held that the nonrenewal of a nontenured teacher deprived the teacher of her liberty interest. As a consequence, the failure to provide a hearing was a constitutional violation, and the court was advising the lower court on an appropriate remedy since the board, after *Owen*, is not immune because of its good faith conduct.[93] Basically, the teacher is entitled to back pay and reinstatement, as well as nominal damages, if she can show that she suffered injury by not receiving appropriate procedural due process.

The Fifth Circuit Court of Appeals affirmed a trial court decision that nonrenewal of a nontenured public school teacher occurred because of the teacher's free speech.[94] Therefore, the teacher's nonrenewal violated his constitutional rights, and the jury's award of damages against school board members and certain school administrators was affirmed.

An assistant principal claimed that his midyear reassignment to a nonadministrative position violated his due process rights. Even though the plaintiff received the contracted salary after being reassigned as a classroom teacher, the court held this amounted to a violation of a property interest in the assistant principal's job.[95]

He was not given notice or a prereassignment hearing, and therefore there was a violation of procedural due process rights. Because he received a postdeprivation hearing which satisfied due process requirements the plaintiff was not entitled to reinstatement. He is entitled to recover actual damages proven to have been proximately caused by the predeprivation due process denial and nominal damages not to exceed $1. Damages and attorney's fees were assessed against the board of trustees in its official capacity and against the superintendent in both his official and individual capacity.[96]

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[92] Clanton v. Orleans Parish School Bd., 649 F.2d 1084 (5th Cir. 1981).

[93] McGhee v. Draper, 639 F.2d 639 (10th Cir. 1981).

[94] Brown v. Bullard Indep. School Dist., 640 F.2d 651 (5th Cir. 1981).

[95] Thomas v. Board of Trustees of Galveston Indep. School Dist., 515 F. Supp. 280 (S.D. Tex. 1981).

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[96] *See also* Schreffler v. Board of Educ. of Delmar School Dist., 506 F. Supp. 1300 (Del. 1981) where damages awarded to dismissed principal on basis that procedural due process and privacy rights were violated in his dismissal.

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6

FINANCE

Richard A. Rossmiller

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6.0 INTRODUCTION

The period of time covered by this review witnessed continuing litigation concerning the use of public funds for private schools, although no cases involving the transportation of private school students were decided. Challenges to the constitutionality of state support programs continued, as did litigation dealing with the funding of programs for children with special needs and with the requirements and enforcement of federal regulations. An increase in the number of cases involving tax and expenditure limitations was noted, reflecting the increasing fiscal restraints within which school districts must operate.

6.1 PUBLIC FUNDS FOR PRIVATE SCHOOLS

Two cases decided in federal courts involved challenges to the constitutionality of state statutes which granted tax exemptions to private racially segregated schools. In a Mississippi case, action was brought by parents of black children who were attending the public schools of Mississippi.[1] They challenged the constitutionality of certain sections of the Mississippi statutes which granted exemption from state, county or municipal sales or property taxes to private schools which engaged in racial discrimination in their admission policies and employment practices. The defendants moved to dismiss but the court denied the motion, ruling that the defendants had standing to bring suit and that they had stated a claim upon which relief could be granted.

The second case was also initiated by parents of black children attending public schools.[2] They charged the Internal Revenue Service with failure to confine tax exemptions authorized under section 501(c)(3) of the Internal Revenue Code to private schools operating on a racially nondiscriminatory basis. A federal district court dismissed the case on grounds that the parents lacked standing to sue and that it should defer to the Internal Revenue Service and Congress. The plaintiffs appealed and the circuit court of appeals ruled that, based on precedent established by previous United States Supreme Court decisions, the district court had authority to fashion a remedy and that the case should be adjudicated on its mertis. the case was remanded to the district court for trial.

In Massachusetts the state brought suit to require the Springfield School Committee to enter into agreements with private schools and institutions in order to provide special education programs for children whose needs could not be met in the local public schools.[3] The state charged that the school committee had failed to comply with the provisions of state statutes dealing with the rights of school-age children with special educational needs. The school committee contended that agreements with private schools or institutions (other than institutions for the deaf, dumb, and blind) were prohibited by article 46, section 2 of the Massachusetts Constitution. Noting that a statute is to be afforded a presumption of constitutional validity, the court applied the following criteria:

> (1) Whether the purpose of the challenged statute is to aid private schools; (2) whether the statute does in fact substantially aid such schools; and (3) whether the statute avoids the political and economic abuses which prompted the passage of art. 46.[4]

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1. Moton v. Lambert, 508 F. Supp. 367 (N.D. Miss. 1981).
2. Wright v. Regan, 656 F.2d 820 (D.C. Cir. 1981).
3. Commonwealth v. School Comm. of Springfield, 417 N.E.2d 408 (Mass. 1981).
4. *Id.* at 414.

After analyzing the statute in terms of these three criteria, the court found that the purpose of the statute was not to aid private schools; that benefits under the statute flowed first to individual students and that any public money spent for private placements was in direct return for services actually rendered; and that the statute did not promote aid to sectarian institutions and was neither politically divisive nor financially wasteful. Thus, the court upheld the constitutionality of the Massachusetts special education law commonly referred to as "Chapter 766."

6.1a Auxiliary Services, Textbooks and Instructional Materials

A case decided by the Supreme Court of California contested the constitutionality of sections 60315 and 60246 of the California Education Code which authorized the Superintendent of Public Instruction to lend, without charge, textbooks used in the public schools to students attending nonprofit, nonpublic schools.[5] The plaintiffs alleged that these sections violated the establishment clause of the First Amendment; article IX, section 8 of the California Constitution (prohibiting the appropriation of public money for the support of sectarian schools); and article XVI, section 5 of the California Constitution (forbidding the legislature to aid or support any school controlled by a church or a sectarian denomination). The trial court ruled for the defendants and the plaintiffs appealed. The Supreme Court of California held that the provisions in question did indeed violate California's constitutional prohibitions against appropriating money for support of sectarian schools. The court rejected the "child benefit" doctrine because it concluded that doctrine leads to results which are logically indefensible. It concluded that benefit to the pupil was inseparable from benefit to the school; that both the child and the school benefit from the loan of textbooks. The court noted that:

> The authorities are virtually unanimous in characterizing textbooks as having a central place in the educational mission of a school. . . .
>
> By providing textbooks at public expense, the loan program appropriates money to advance the educational function of the school. In this respect the program is distinguishable from "generalized services government might provide to schools in common with others," such as fire and police protection, the maintenance of roads and sidewalks, and similar public services. These services, unlike education, have no doctrinal content, and they do not advance the essential objective of the sectarian school, which is the education of the child. . . .

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[5] California Teachers Ass'n v. Riles, 632 P.2d 953 (Cal. 1981).

> Since we reject the application of the "child benefit" principle . . . it follows we cannot agree that a benefit to the school in the form of a loan of textbooks is justified because the books will be used only for secular instruction.[6]

6.2 SOURCES AND ALLOCATION OF PUBLIC SCHOOL FUNDS

6.2a State School Finance Programs

Further action occurred concerning the constitutionality of the New York's school finance program. A trial court had held that state's program unconstitutional in an earlier decision.[7] Appeal was taken and the supreme court, appellate division, upheld the trial court's ruling that the New York system of financing public education was constitutionally defective under the state constitution.[8] However, it overruled the trial court's finding that the New York school finance system also violated the Fourteenth Amendment. Article XI, section 1 of the Constitution of New York states: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of the state may be educated." Article I, section 11 of the New York Constitution also declares: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof." The plaintiffs claimed that the state school finance program denied them the level of educational resources available to wealthy districts and compelled them to offer inferior education for their students. After reviewing the various constitutional tests applicable in equal protection cases, the court concluded the strict scrutiny test was not appropriate because the state's highest court did not regard education as a fundamental right. It also decided not to apply the rational basis test. It chose instead an "intermediate review," reasoning that education fulfills a fundamental obligation of government and that it is one of the most important functions of state and local governments. The court noted:

> Once it has been demonstrated that an important interest has been infringed, the first prong of intensified—though less than strict—equal protection review mandates inquiry as to whether the challenged classification substantially furthers the important governmental purpose the State articulates to defend it. If the State meets the test, it still must show under the

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[6] *Id.* at 963-64.

[7] Board of Educ., Levittown Union Free School Dist. v. Nyquist, 408 N.Y.S.2d 606 (1978).

[8] Board of Educ., Levittown Union Free School Dist. v. Nyquist, 443 N.Y.S.2d 843 (N.Y. App. Div. 1981).

> second prong that the objectives advanced by the classification cannot be achieved by a less intrusive alternative.
>
> Here, the disputed classification makes education a function of wealth and permits invidious disparities in education and educational opportunity between school children on the basis of the property wealth of the school districts in which they reside.[9]

The major interest cited by the state was that the existing method of financing education preserved local autonomy. The court found this to be an appropriate rationale but ruled that the state had not sustained its burden of proof. Although not expressing a preference for any of the numerous proposals for educational finance reform, the court observed, "A fiscal scheme which affords a constitutional degree of equality of educational opportunity need not be inconsistent with local freedom of choice."[10]

After reviewing the evidence concerning educational attainment of students in the state, particularly those in the largest cities, the court concluded:

> In the face of evidence demonstrating that large numbers of children emerge from the school system lacking even the minimal tools necessary to function in society, and that the current financing scheme is in good measure a cause for the failures, we must conclude that the education article is violated by a method of financing which fails to establish a school system capable of providing an education for many educable children.[11]

The appropriations bill enacted in Florida in 1978-79 guaranteed a minimum increase of 7.25 percent in school funding for all counties except those where the millage value per student exceeded 120 percent of the statewide average. The increase was a supplement to the statutory formula in existence at that time, which also guaranteed that no district would receive less than the level of funding it had received the previous year. Four school districts were ineligible to receive the 7.25 percent increase and one of them, Collier County, brought suit claiming that the appropriations bill violated a constitutional provision that appropriations laws were not to change or amend existing law.[12] The trial court held in favor of the plaintiffs and appeal was taken to the Supreme Court of Florida, which reversed the judgment of the lower court. The court ruled that the 7.25 percent guaranteed increase was only a supplement to the statutory formula; that the "hold harmless" provision of the statutory formula was not violated since none of the four counties actually received less funding than they had received the previous year; and that the legislature acted within its authority in providing a specific amount of additional money for specifically identified school districts. The court observed:

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[9] *Id.* at 859.

[10] *Id.* at 860.

[11] *Id.* at 864.

[12] Department of Educ. v. School Bd. of Collier Cty., 394 So. 2d 1010 (Fla. 1981).

> The legislature is not required to distribute educational funds to all school districts in an equal mathematical proportion. The legislature may, if it so desires, distribute the state funds on the basis of public educational need. That need is readily apparent in this record. The legislature determined that this guaranteed supplemental increase of 7.25 percent should not apply to districts that had a millage yield per student of twenty percent above the average because those districts had much greater local resources.... [The] disparity in school funding between rich and poor districts was clearly the reason the legislature decided to provide supplemental money only to those districts which had a value of a mill of less than twenty percent over the statewide average.[13]

In another case the Florida Supreme Court reconsidered a case it had originally decided in 1979 and concluded that its original decision was partially in error.[14] The case involved a challenge to a provision of an appropriations act requiring that school district cost differentials be employed as one factor in computing the amount of state aid to be received by Florida school districts. In this instance the court decided that such language could not be included in an appropriations act since its effect was to modify other provisions of the statutes and thus it was constitutionally impermissible.

A case decided by a federal district court in Texas involved a challenge to the constitutionality of Texas Education Code, title 2, section 21.031, which provided that only children who were citizens of the United States or legally admitted aliens between the ages of five and twenty-one years would be entitled to attend public schools free of tuition.[15] Thus, undocumented alien children were not entitled to attend the public schools and local school districts were given discretion to either deny admission to such children or permit them to attend only upon payment of tuition. Several actions brought against the State of Texas and the Texas Education Agency challenging the constitutionality of the statute were consolidated in this case. The court, in a lengthy decision, dealt with a variety of issues concerning both procedural and constitutional matters. It ruled that the statute in question violated the Fourteenth Amendment guarantee of equal protection of the law, holding that the state had failed to establish that its concern for fiscal integrity was a compelling state interest, that excluding undocumented alien children from school was necessary to the improvement of education in Texas, and that the classification used actually advanced the state's interest.

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[13] *Id.* at 1013.

[14] Gindl v. Department of Educ., 396 So. 2d 1105 (Fla. 1981).

[15] *In re* Alien Children Educ., 501 F. Supp. 544 (S.D. Tex. 1980).

Several cases decided during the past year dealt with the effect of state budget cuts or other reductions in state aid. In West Virginia, for example, a county board of education and the state board of education sought to compel the governor to restore a two percent cut in the level of expenditures which the legislature had authorized for public education during the 1981 fiscal year.[16] The governor had ordered a two percent reduction in overall state expenditures, including those for education, because of an anticipated shortfall in state revenue. Plaintiffs argued that the West Virginia Constitution gives public education a preferred position, and that the governor could not reduce expenditures authorized by the legislature for public education in the manner proposed. The Supreme Court of Appeals of West Virginia agreed with the plaintiffs, holding that for the governor to order a pro-rata reduction in expenditures for public education, it would be necessary to develop a factual basis showing there would be a deficit in the general revenue fund large enough to warrant reducing expenditures for public education. The court stated that "because of public education's constitutionally preferred status in this State, expenditures for public education cannot be reduced . . . in the absence of a compelling factual record to demonstrate the necessity therefor."[17]

A case decided by the Supreme Court of Wisconsin involved a similar question.[18] The secretary of the Wisconsin Department of Administration had issued an order directing that all allotments from the general purpose revenue of the state be reduced by 4.4 percent below the levels appropriated for fiscal year 1981. The secretary relied upon authority granted by statute to order a reduction in departmental expenditures if it appeared that state revenue would not be sufficient to cover all legislative authorizations. A school district brought suit challenging the secretary's authority to order reductions in state school aid payments. The court ruled in favor of the plaintiff, finding that the disbursement of general and categorical school aids was a mechanical task of the Wisconsin Department of Public Instruction, and therefore that the payments could not be considered "departmental expenditures." Since the state aid payments were not regarded as departmental expenditures, the secretary was enjoined from reducing payments to school districts below the amounts appropriated by the legislature.

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[16] State *ex rel.* Bd. of Educ. v. Rockefeller, 281 S.E.2d 131 (W. Va. 1981).

[17] *Id.* at 136.

[18] School Dist. of LaFarge v. Lindner, 301 N.W.2d 196 (Wis. 1981).

In a case decided in California,[19] the state aid received by a school district was reduced as a result of legislation designed to soften the impact of the loss of revenue following adoption of Proposition 13. The district brought suit, claiming that the reduction in its state aid was, in part, caused by the failure to exclude federal "impact aid" money from the district's fund balances when computing the amount its state aid should be reduced. The trial court ruled in favor of the plaintiff and the state appealed. The trial court's decision was upheld by appellate court, which noted that federal statutes prohibit a state from taking federal impact aid money into consideration when allocating state school funds, and that attempts to do so have consistently been invalidated by the courts.

The Supreme Court of Pennsylvania decided two cases in which the amount of state aid received by school districts was reduced because they had failed to provide the full 180 days of instruction mandated by state statute. In one case,[20] a teachers' strike during the 1976-77 school year resulted in only 156 days of instruction being provided. In the second case,[21] the school district provided only 173 days of instruction as a result of a teachers' strike. In each case the district's state aid was reduced because the Pennsylvania Department of Education calculated the district's state aid entitlement on the basis of the number of days of instruction it actually had provided. The Public School Code provided that state aid would not be reduced when schools were closed because of contagious disease, destruction or damage of a building by fire, weather emergencies, or a nuclear emergency, but it made no provision for situations where schools were closed as a result of a teachers' strike. The court held that the method used by the Department of Education in calculating the amount of state aid to which each district was entitled was valid and that where a school district provided less than the required 180 days of instruction as a result of a teachers' strike, it was not entitled to state aid in the same amount as if it had furnished 180 days of instruction. The court commented:

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[19] San Miguel Joint Union School Dist. v. Ross, 173 Cal. Rptr. 292 (Cal. Ct. App. 1981).

[20] Pennsbury School Dist. v. Commonwealth Dep't of Educ., 422 A.2d 1052 (Pa. 1980).

[21] School Dist. of Pittsburgh v. Commonwealth Dep't of Educ., 422 A.2d 1054 (Pa. 1980).

> We are satisfied that the Legislature did not intend to favor a strike-affected district with a full subsidy where it provides fewer days of instruction than the number required by state law. There is not the slightest trace of legislative intent to give the same subsidy for less instruction, let alone even a suggestion of intent to afford an incentive to provide less instructional days. Indeed, there is clear legislative intent to the contrary. Only in the specific enumerated exceptions previously discussed does the Legislature permit a school district to receive a full subsidy where less than 180 days have been provided. Strike-related reductions in instructional days are not included among the named exceptions....
>
> The Department's determination assures that districts providing less than a full 180 days of instruction as a result of a strike are not favored, thus achieving the Legislature's goal of fair subsidy allocation in relation to days of instruction provided.[22]

A township in New Jersey which was part of a regional school district challenged the procedure employed by the Commissioner of Education in calculating the amount of state aid to which the school district was entitled.[23] The township claimed that rather than combining the equalized valuations of all municipalities within the school district, the commissioner should have made separate computations for each municipality. The court flatly rejected this argument, pointing out that

> when a municipality poorer in equalized valuation per pupil opts to regionalize with a wealthier neighbor, it is an implicit consequence of that choice that the level of state support will be based on the resources and pupils of the resultant regional district as a whole. Any other approach to state aid would, in our view, be wholly antithetical to the concept and functioning of the regional district.[24]

The Syracuse, New York, school district sought a declaratory judgment that it had no obligation to reimburse the state's health insurance reserve fund or the state department of education for a sum of money the district had received from the fund.[25] The court was required to construe some inconsistent provisions of the state statutes. It determined that certain statutory provisions enacted in 1977 were in direct conflict with the state finance law and construed the legislation adopted in 1977 as repealing the inconsistent provisions of the state finance law, since they were passed subsequent to the enactment of that law. The court decided the school district was not obligated to reimburse the fund for the payment it had received in 1977.

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[22] *Id.* at 1060.

[23] Township of Washington v. Burke, 428 A.2d 1325 (N.J. Super. App. Div. 1981).

[24] *Id.* at 1326.

[25] Board of Educ., Syracuse City School Dist. v. Regan, 432 N.Y.S.2d 823 (N.Y. Sup. Ct. 1980).

A case decided by the Supreme Court of Pennsylvania involved the question of whether or not all other school districts should have been joined in a suit seeking to enjoin payment of the final installment of state school aids for the 1977-78 school year.[26] The Mechanicsburg Area School District sought the injunction because it claimed that the secretary of revenue had erred in determining the total number of taxpayers whose incomes should have been attributed to the school district and used in computing the amount of state aid to which the district was entitled. The trial court dismissed the district's petition on the ground that it had failed to join all other school districts in the suit. The Pennsylvania Supreme Court reversed the lower court's decision holding that all other school districts in the state were not indispensible parties because their right to a correct and accurate determination of the amount of state aid to be granted them was not interlocked with the rights of the Mechanicsburg district, and because recalculation of the subsidy due the Mechanicsburg district would not require recalculation of the total school subsidy.

6.2b Funds for Special Education

The point at issue in a Massachusetts case was whether or not the Perkins School for the Blind was entitled to interest on the difference between amounts originally paid by the Commonwealth of Massachusetts for the education and care of students with special needs and the higher amounts which were later determined to have been payable for such services.[27] The school had announced increases in its charges for the 1971-72 school year but, following imposition of a wage-price freeze by the President of the United States, the Massachusetts Rate Setting Commission set reimbursement rates lower than the rates charged by the Perkins school. A second controversy arose because the Rate Setting Commission established reimbursement rates on a calendar year basis but the school's charges were established on a school year basis. The school sought reimbursement for the difference between the rates actually paid by the state and the charges which had been fixed by the school for the periods in question. An administrative hearing resulted in a ruling in favor of the school. The school then raised the question of its entitlement to interest on the amounts due it. The court held that under the laws of Massachusetts, the school was entitled to receive interest on the difference between each monthly payment originally made by the commonwealth and the amount which the state should have paid as determined by the administrative hearing.

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[26] Mechanicsburg Area School Dist. v. Kline, 431 A.2d 953 (Pa. 1981).

[27] Perkins School for the Blind v. Rate Setting Comm'n, 411 N.E.2d 1317 (Mass. App. 1980).

A federal district court in New York was required to determine whether or not a handicapped child attending a private school was entitled to public funding of the cost of his education.[28] The child suffered minimal brain dysfunction and attended a public school until the third grade when he was placed in a private school. Later he was evaluated by the public school district's Committee on the Handicapped, which recommended that he be placed in a New York City public school which offered a program for children with his handicap. The child's mother challenged the recommendation and continued to enroll the child in a private school. Although administrative hearings later resulted in a determination that the child's classification and placement were suitable, the hearing officer found that the Committee on the Handicapped had violated a rule of the New York Commissioner of Education by failing to have a physician present at the conference at which the child's classification was determined. Consequently, the hearing officer ruled that public funding should be granted for the child's attendance at the private school in 1979-80. The committee then reevaluated the child and again recommended that he be placed in a special program provided by a public school. The mother again objected, and following a hearing the hearing officer upheld the committee's recommendation and ordered that public funding for attendance at the private school be denied for the 1980-81 school year. The court found the procedures followed in the case met the requirements of an impartial due process hearing and that the recommendation that the child be placed in a public school class for children with special needs was supported by a preponderance of the evidence. The child's claim for reimbursement of the cost of attending the private school during 1980-81 was based on 20 U.S.C. § 1415(e)(3) which provides that a child is to remain in his or her current educational placement during the pendency of any proceedings. The court noted this provision had been held in previous cases to require a school district to continue to fund an educational placement which it had funded prior to the commencement of the proceedings. In the present case, however, the court ruled:

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[28] Zvi D. v. Ambach, 520 F. Supp. 196 (E.D.N.Y. 1981).

> When Zvi attended The Alternative School for the 1980-81 school year, he did so in spite of the Committee's contrary recommendation. Since he was not promised and was not receiving public funding when the proceedings were initiated and since he began the new school year in his private program without any new assurances, he is not entitled to public funding during the pendency of the proceedings.[29]

The court observed that to rule otherwise would permit a handicapped child who was being educated in a private school with public funding to thwart indefinitely any attempt to transfer him to a public school.

An organization representing private schools sought to have set aside a determination by the New York Commissioner of Education establishing the allowable tuition rate which the schools could charge for instructing handicapped children during the 1979-80 school year.[30] New York's law specifically authorized school districts to enter into contracts with private schools for the provision of educational services and programs to handicapped children and also empowered the commissioner to determine annually the allowable tuition rate for each private school. The commissioner had imposed a limit of 4.5 percent on staff salary increases for the 1979-80 school year (which he later raised to eight percent following an administrative appeal). The plaintiffs claimed that the ceiling on teaching salaries imposed by the commissioner was arbitrary and capricious and that he was without authority to establish an arbitrary ceiling on teacher salary increases. The petitioners sought to have the commissioner's tuition rate set aside and a new tuition rate established which would permit the schools to recover the full cost of their instructional services. The court ruled the commissioner had been given broad discretion to determine allowable tuition rates for handicapped children being educated in nonpublic schools, and that his determination to impose a ceiling on permissible salary increases was neither arbitrary nor capricious. The plaintiff's petition was denied.

In North Carolina the parents of a child with special needs who was being educated in a school operated by a private nonprofit corporation requested a hearing to review the school board's decision not to pay the child's tuition at the private school.[31] The school attended by the child, Frankie Lemmon School, was supported in part by state funds provided by the Department of Human Resources. The Wake County Board of Education provided the child with transportation and speech therapy services, but refused to pay her tuition on the grounds that the Department of Human Resources should pay the cost of her education out of the P.L. 89-313 funds it received. Fearing that the Frankie Lemmon School would go bankrupt, the parents requested a due process hearing to review the county school board's decision not to pay the child's tuition and a local hearing officer ruled that the school board was obligated to pay. The school board appealed and a hearing officer for the State Superintendent of Public Instruction reversed the local hearing officer's decision on the basis that the parents lacked standing to complain. The parents then appealed to the superior court which reversed the state reviewing officer's decision and the school board appealed. The Court of Appeals of North Carolina reversed the judgment of the superior court, ruling that the parents had no standing to request a due process hearing since the parents could never, under existing law, be charged with the expenses of providing their child with an appropriate education. The court reasoned that even should the Frankie Lemmon School discontinue operation, the child would still be entitled to a free and appropriate education and that it would be the responsibility of the county school board or some other governmental entity to provide that education.

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[29] *Id.* at 203.

[30] Organization to Assure Servs. for Exceptional Students, Inc. v. Ambach, 432 N.Y.S.2d 54 (N.Y. Sup. Ct. 1981).

[31] Linder v. Wake Cty. Bd. of Educ., 273 S.E.2d 735 (N.C. App. Ct. 1981).

In a Pennsylvania case a county intermediate unit challenged the refusal of the State Department of Education to reimburse it for the cost it had incurred in providing special education programs.[32] The department of education filed a number of preliminary objections. These were rejected by the court which ruled that a complaint alleging that the department had arbitrarily and fraudulently refused to reimburse school districts for special education costs they had incurred stated a claim enforceable through mandamus action, and that the possible lack of sufficient funds did not affect the unit's right to reimbursement although it could be employed as a defense to subsequent execution of any judgment which might be issued.

In a case decided by the Supreme Court of Connecticut a town board of education appealed the State Board of Education's decision ordering it to pay all reasonable education costs for educating a handicapped child in a private center.[33] The child in question suffered from multiple handicaps. Prior to September, 1976, he had been enrolled in a special education program in a public school but had begun to develop problematic behavior which became increasingly severe and constituted a danger to other children in the classroom. When the parents and the school system could not agree on a course of action, a review by the State Board of Education as provided by statute was requested. The hearing could not be scheduled until after the beginning of the school year and the boy's parents, believing that the special education program provided by the local board of education was inappropriate for their son's needs, enrolled him in the Intensive Education Center, a private nonsectarian institution. Following the hearing before the State Board of Education, it was concluded that the educational program provided by the local district was not adequate to meet the child's needs and that the Intensive Education Center's program allowed for a better prognosis for his academic growth. The Manchester Board of Education was directed to pay all reasonable educational cost for the child, including transportation. The board of education appealed and the decision was upheld by the Supreme Court of Connecticut. The court pointed out that the boy's parents had exhausted every remedy provided by statute and, because of a delay in the originally scheduled hearing, were forced to either return their son to a program they believed to be inadequate or enroll him in a private facility. The court upheld the decision of the State Board of Education and ordered the local school district to pay the cost of the child's private school program.

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[32] Philadelphia Cty. Intermediate Unit No. 26 v. Commonwealth Dep't of Educ., 432 A.2d 1121 (Pa. Commw. Ct. 1981).

[33] Board of Educ. of the Town of Manchester v. Connecticut State Bd. of Educ., 427 A.2d 846 (Conn. 1980).

6.2c Federal Funds for Education

The year witnessed another episode in the continuing litigation between the Board of Education of the City School District of the City of New York and the United States Department of Education with regard to the school district's eligibility to receive funds under the Emergency School Aid Act (ESAA) of 1972.[34] The board of education sought to overturn a denial of its application for a waiver of ineligibility. A federal district court ruled in favor of the board and the department of education appealed. The United States Court of Appeals affirmed the district court decision, ruling that *res judicata* did not bar the board's application for a waiver of ineligibility. In earlier litigation, it had been decided that the district was ineligible to receive Emergency School Aid Act funds under its initial application.[35] However, the court noted that Congress established two ways in which a school district could receive ESAA funds. One way was through the initial application; the other through an application for a waiver. The court pointed out that in the present case the board was seeking a waiver of ineligibility and that the determination of whether to grant such a waiver would turn on factors other than those used in determining whether the initial application should be approved.

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[34] Board of Educ. of the City School Dist. of the City of New York v. Hufstedler, 641 F.2d 68 (2d Cir. 1981).

[35] *See* THE YEARBOOK OF SCHOOL LAW 1980 (P. Piele, ed.) [hereinafter cited as YEARBOOK 1980] at 287.

6.3 SCHOOL TAX ISSUES

6.3a Power to Tax

The Nebraska Public Power Company sought to have declared unconstitutional a statute under which it was required to pay money to school districts to offset the expense of educating the children of workers employed in constructing an electric generating facility.[36] Article VIII, section 11 of Nebraska's Constitution was amended in 1959 to provide for payments in lieu of taxes by public power districts and it also specified the taxes which were not to be included in such "in lieu" payments. In 1978 Nebraska passed legislation providing for additional payments tc be made to any school district in which the number of children of workers employed in constructing an electrical generating facility exceeded either ten percent of the students attending school in the district, or thirty-five students, whichever was less. Previous litigation had established that public power districts were governmental subdivisions of the state and thus all of their property was exempt from taxation except as specifically allowed by the constitution. The school districts argued that the payments imposed under the statute constituted a fee, not a tax. The court pointed out, however, that the educational services provided by school districts were not for the benefit of the power company, but for the benefit of the students and/or their parents, and that the Nebraska constitution required that instruction in the common schools of the state be free. The court ruled that the payments in question were taxes or payments in lieu of taxes, not payment for services rendered by school districts for the benefit of the power district, and thus they were unconstitutional.

The Supreme Court of Kansas upheld the constitutionality of an act which granted tax exemptions to port authority projects.[37] The court was considering amendments to an act it had previously held constitutional but defective for want of adequate definitions and guidelines. Subsequent amendments to the act by the legislature were found to remove the previous defects and it was ruled that the tax exemptions granted in the act as amended did not constitute improper interference with the assessment and collection of school taxes.

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[36] Nebraska Pub. Power Dist. v. Hershey School Dist., 299 N.W.2d 514 (Neb. 1980).

[37] State *ex rel.* Tomasic v. Kansas City, 630 P.2d 692 (Kan. 1981).

In a case decided by the Supreme Court of South Carolina a manufacturer sought a refund of property taxes that had been paid under protest.[38] The manufacturer claimed exemption from the taxes in question under various provisions of the South Carolina Code and the South Carolina Constitution which provided for exemptions from all county taxes except those levied for school purposes. Among the taxes for which refunds were sought were those levied to support a county library and a county museum. The court ruled that taxes levied for the library and the museum were neither taxes for a school purpose nor school taxes. The court ruled that to qualify for school tax status, the unit levying the tax must be predominantly concerned with schooling and held that schooling wa snot the predominant concern of either the library or the museum.

A group of taxpayers in Missouri brought an action to enjoin the levy of a tax rate they claimed to be illegal.[39] Article X, section 11(b)(c) of the Missouri Constitution as amended in 1970 provided that school tax rates exceeeding $1.25 per hundred dollars of assessed valuation required authorization by a majority of the qualified electors in the district, and that the last rate approved by the electors would continue in effect. In this case a levy of $3.63 was approved for a two-year period at an election held in 1976. In 1978 an election to maintain the $3.63 rate was defeated and the board set the operating levy at $2.65, the previously approved rate. In 1979 the voters defeated a proposal to set the operating levy at $3.50 but the school board later filed an estimate which would require a levy of $3.63 and the taxpayers sought to enjoin the levy. The Supreme Court of Missouri held that if no time limit had been placed on the levy approved in 1976, it would have continued indefinitely. However, by placing a two-year limitation on the increase approved in 1976, that authorization expired at the end of the 1978 school year. Thus, the school board was required to submit the proposition to continue the tax rate at $3.63 to the voters and since three attempts to retain the increase failed, the tax rate was returned to $2.65, the last rate which had been approved by the voters prior to the 1976 election.

A Pennsylvania taxpayer sought to strike liens against its property held by a school district.[40] The property in question was a burial place and the trial court concluded the taxpayer was entitled to an exemption and ordered the liens stricken. The school district appealed and the Commonwealth Court of Pennsylvania reversed the decision of the lower court because the taxpayer had failed to follow the proper procedure in challenging the liens. The court held that the taxpayer was foreclosed from a collateral attack on assessments underlying the school district's liens because of the failure to pursue the statutory appeals process.

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[38] John D. Hollingsworth On Wheels, Inc. v. Greenville Cty. Treasurer, 278 S.E.2d 340 (S.C. 1981).

[39] Ederer v. Dalton, 618 S.W.2d 644 (Mo. 1981).

[40] *In re* Mausoleum Constr. Co., 423 A.2d 809 (Pa. Commw. Ct. 1980).

In another Pennsylvania case a taxpayer was found guilty of failure to pay school taxes.[41] The taxpayer claimed he was a resident of Ohio, not Pennsylvania, and therefore not liable for the taxes. Evidence indicated the taxpayer was not legally separated from his wife, that his wife and children resided in the school district, that his children attended the district schools, that he had a Pennsylvania driver's license, and that he had filed personal income tax returns in Pennsylvania. The evidence was sufficient to establish beyond a reasonable doubt that the taxpayer was a resident of the district and thus the court ruled he was obliged to pay the school tax in question.

In another Pennsylvania case the Pittsburgh school district attempted to collect a wage tax assessment for the years 1968 through 1977 from a restaurant located outside the district.[42] Acting under the authority of statute, the district had annually adopted a resolution imposing a tax on the wages of district residents. Nonresident employers had a duty to withhold taxes on the wages received by employees who were residents of the district. The business involved had not withheld the taxes and the district sought to collect the amount of tax due plus interest and penalities. The commonwealth court upheld the trial court's decision that the district was not empowered to make an assessment against a nonresident employer who had failed to withhold the wage taxes. The district could attempt to collect the overdue taxes from the individual employees, or it could seek to impose criminal sanctions on the restaurant, but it could not recover from the restaurant the wage taxes which the restaurant failed to withhold.

A Texas school district brought suit for delinquent taxes alleged to be owed on two vessels based at the Port of Brownsville, which was within the boundaries of the school district.[43] The taxpayer claimed that the delinquent tax roll, which was prepared by a computer service based on information supplied by the tax assessor, was improperly admitted into evidence and that the tax assessor's testimony concerning the tax roll was improperly allowed. The Texas Court of Civil Appeals rejected both arguments, pointing out that a computerized tax roll had been held admissible in a prior Texas case. The court upheld the judgment against the taxpayer, although it modified the judgment to conform with the amount found due under its findings of fact.

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[41] Smith v. Commonwealth *ex rel.* Southwest Butler Cty. School Dist., 424 A.2d 1001 (Pa. Commw. Ct. 1981).

[42] School Dist. of the City of Pittsburgh v. Sgro Brothers Restaurant, 433 A.2d 589 (Pa. Commw. Ct. 1981).

[43] Kirkconnell & Cooper, Inc. v. Point Isabel Indep. School Dist., 608 S.W.2d 743 (Tex. Civ. App. 1980).

In another Texas case taxpayers brought suit against the Crystal City Independent School District to enjoin the collection of portions of the 1978 tax roll.[44] The issues raised in this case were virtually identical to those it had dealt with previously,[45] and the court reached the same conclusion, namely, that the school board's tax scheme unlawfully discriminated against plaintiffs whose property qualified for valuation as agricultural property.

In a third Texas case, a property owner sought a declaratory judgment that a school district's 1980 tax levy was invalid and an injunction to prevent collection of the district's 1980 taxes.[46] The property owner claimed that meetings of the district's board of equalization and board of trustees had violated the Texas Open Meetings Act. The court of civil appeals upheld the trial court's decision to deny the injunction because the property owner failed to show he would sustain irreparable injury if the injunction were not issued.

Another Texas case involved a dispute between a school district and the Tenneco Corporation concerning the value of the portion of the pipeline and a compressor station located within the district.[47] Tenneco initiated the action by asserting its right to appeal the market value placed on its property by the school district's board of equalization. A jury decided the market value of the property was indeed lower than the value established by the school district and the school district appealed. The judgment was affirmed by the court of civil appeals, which held that a property owner has a constitutional right to appeal valuation of property established by a board of equalization and that there was sufficient evidence supporting the jury's finding as to the market value of the property in question.

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[44] Crystal City Indep. School Dist. v. Crawford, 612 S.W.2d 73 (Tex. Civ. App. 1981).

[45] *See* THE YEARBOOK OF SCHOOL LAW 1981 (P. Piele, ed.) [hereinafter cited as YEARBOOK 1981] at 246-47.

[46] Duncan v. Dripping Springs Indep. School Dist., 612 S.W.2d 644 (Tex. Civ. App. 1981).

[47] Banquete Indep. School Dist. v. Tenneco, Inc., 618 S.W.2d 824 (Tex. Civ. App. 1981).

In yet another Texas case, a school district filed for summary judgment to recover delinquent property taxes which had been assessed by the school district.[48] The trial court granted the motion and the defendants appealed. The property owners contended that the taxes in question were illegal because they had been levied by a resolution rather than by an ordinance as required by law. The court of civil appeals ruled that certified copies of the plaintiff's delinquent tax roll constituted prima facie evidence of the lawful levy of the taxes and the amount of tax due, and that the defendants failed to establish the taxes were not properly levied.

A New York court affirmed a decision involving the exemption from school taxes of property owned by the Newsday Corporation.[49] The trial court had ruled that the property of Newsday was partially exempt from school taxes despite the school district's attempt to retract the tax exemption.[50]

In another New York case a father and two sons sought to have a section of the New York Education Law declared unconstitutional.[51] A school board had failed to receive voter approval of its proposed budget and consequently the district was operating under an austerity budget consisting of only "ordinary contingent" expenses and teacher salary and expenses. The austerity budget provided no support for interscholastic sports, library purchases, or marching band expenses. The plaintiff was a resident and taxpayer of the district and his sons were students who participated in interscholastic sports, library services and marching band activities. The board had adopted its austerity budget based on authority granted by section 2023 of the New York Education Law, which provides for the levy of a school tax for certain purposes without a vote of the electors. The plaintiffs contended that section 2023 was an unconstitutional delegation of taxing power in violation of article XVI, section 1 of the New York State Constitution and that it deprived them of equal protection and due process of law guaranteed by the Fourteenth Amendment. The court disagreed with the plaintiff's contentions stating:

> The State Legislature may delegate its taxing power provided such delegation specifies the types of taxes which may be imposed thereunder and provide for their review.... The statute specifies that, 'in the event the voters refuse to vote the sums estimated to be necessary for teachers' salaries or "ordinary contingent" expenses, then the Board of Education may

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[48] Foster v. Hubbard Indep. School Dist., 619 S.W.2d 607 (Tex. Civ. App. 1981).

[49] Newsday, Inc. v. Town of Huntington, 441 N.Y.S.2d 689 (N.Y. App. Div. 1981).

[50] *See* YEARBOOK 1981 at 252.

[51] Brown v. Board of Educ., Whitesboro Cent. School Dist., 441 N.Y.S.2d 781 (N.Y. Sup. Ct. 1981).

> levy a tax for same. A tax may be levied for legal obligations of the district and those items necessary to maintain the educational program, preserve property and assure the health and safety of the students and staff.[52]

The court also rejected the equal protection argument because the classification in question was not a suspect category and a rational basis existed for the differences in classifications between city school districts and noncity school districts. With regard to denial of due process of law, the court observed that

> The mere existence of voter approval or disapproval does not necessarily guarantee that a student will be provided the right to participate in interscholastic sports, additional library programs, marching band activities, etc. Such activities or programs are not required by statute to be provided and the decision to make such additional activities available is discretionary with each individual board of education.[53]

6.3b Relationship of School Districts to Other Government Units

The Mayor of Holyoke, Massachusetts, claimed that a vote of the Holyoke Board of Aldermen approving the local school committee's request to exceed the "tax cap" was invalid because the mayor had not given his approval.[54] Under the "tax cap" legislation enacted in Massachusetts in 1979, the school committee had no authority to approve a budget which was more than four percent greater than the budget for the preceding fiscal year. If the school committee believed a larger increase was necessary, it could, by a two-thirds vote, request approval of the local appropriating authority—in this case, the Holyoke Board of Aldermen. The school committee submitted such a request to the mayor who, without making a recommendation, transmitted it to the Board of Aldermen. The aldermen voted by a two-thirds majority to approve the increased budget. The mayor then signed a statement disapproving of the waiver of the "tax cap" and brought action to block the budget increase. The court ruled that under the legislation in question, the mayor's approval was not required and the absence of his recommendation did not invalidate the action by the Board of Aldermen authorizing the increase.

A case arising in Boston involved the question of whether or not the mayor could refuse to submit to the city council a request from the Boston School Committee for a supplemental appropriation needed to fund collective bargaining agreements.[55] The laws of Massachusetts set forth a comprehensive scheme governing public sector collective bargaining. The roles and obligations of a school committee, mayor, and city council are set forth in the collective bargaining law. In this case the Boston School Committee requested a supplemental appropriation needed to fund collective bargaining agreements with teachers and other employees. The supplemental appropriations was required because the school committee did not have enough money remaining in its existing appropriation to cover the cost of the new agreements. The city argued that the mayor was required to submit such a request to the city council only after he had determined that the amount requested was necessary to fund the agreements and that the money was not available within the funds of the school committee. The plaintiffs argued that the mayor was required to submit the supplemental appropriation request to the city council and had no discretion in the matter. The court concluded that, under the provisions of the law, "the mayor has no bargaining function here, nor does he have an appropriating function. His role in submitting school committee requests to the city council for supplemental appropriations needed to fund collective bargaining agreements is a ministerial one."[56] Thus, the court concluded that the mayor must submit to the city council the school committee's request for a supplemental appropriation to fund an executed collective bargaining agreement within thirty days from the date the agreement is executed. However, the court also ruled that the mayor could not be required to submit requests for such supplemental appropriations before the expiration of the thirty-day period, nor for anticipated, but unexecuted, contracts. The court also ruled that under the provisions of Massachusetts law the mayor was without power to veto an order of the city council appropriating money to fund collective bargaining contracts.

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[52] *Id.* at 783.

[53] *Id.*

[54] Mayor of Holyoke v. Board of Aldermen of Holyoke, 412 N.E.2d 328 (Mass. 1980).

Another dispute arose in Boston concerning the funding of special education programs.[57] Members of the Boston School Committee and taxpayers complained that the city had failed to appropriate the amounts necessary to adequately support special education programs in the Boston schools and sought an order requiring the city to appropriate over $46,000,000 in supplemental funds. The plaintiffs claimed that Massachusetts law obligated the city to provide the funding needed for special education and that changes made in 1972 altered the detailed school financing system which had existed in Boston since 1898. The school committee voted to request supplemental appropriations, the mayor refused to submit the request to the city council, and the school committee brought suit. The court distinguished between the arrangements for financing public education in Boston and those which exist in all other Massachusetts school districts. It noted that the scheme gives the Boston School Committee less budgetary control than is enjoyed by school committees in other Massachusetts cities and towns and concluded that the legislature, in enacting the law concerning special education, did not intend to repeal the detailed school financing system which had existed in Boston since 1898. It therefore held that the city of Boston was not required to provide additional funding for special needs programs over and beyond the funds appropriated under the long-standing school finance scheme. The court stated:

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[55] Boston Teachers Union v. City of Boston, 416 N.E.2d 1363 (Mass. 1981).

[56] *Id.* at 1368.

[57] School Comm. of Boston v. City of Boston, 421 N.E.2d 1187 (Mass. 1981).

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> If sufficient funds are not available to finance all of the special education services considered desirable, the school committee may . . . ask the mayor to transmit a request for supplemental funds to the city council. However, nothing in c. 766 supports the plaintiffs' contention that the mayor is required to submit, and the council to approve, the request. If the mayor declines to submit the request, the school committee must allocate the existing funds equitably.... Generally, school committees have long enjoyed the authority to use funds appropriated for school purposes as they see fit.... This is precisely what the Boston school committee has done in the past.
>
> We recognize that the school committee has the difficult task of allocating existing appropriations, a task more difficult in a time when fiscal resources are in short supply and the people have voted to reduce taxes and limit local expenditures in future fiscal years. The problem of limited resources is more properly resolved by the political and legislative process than by resort to the courts. Absent a revision of the historic statutory scheme by the Legislature, the duty of the courts is to preserve the legislatively prescribed "unique balance," . . . of responsibilities between the school committee and the city officials concerning Boston public school financing.[58]

An Illinois case involved an attempt by one school district to recover tax funds that had mistakenly been paid to an adjoining school district.[59] During the tax years 1972 and 1973 taxes on certain property located within the Selmaville School District were mistakenly paid to the Salem Elementary School District. The Selmaville district brought suit to recover these taxes from the Salem School District. The trial court held in favor of the Salem district on the basis that Selmaville had failed to pursue the appropriate administrative remedies and the Selmaville district appealed. The Illinois Appellate Court concluded that the Salem district had "received money under such circumstances that, in equity and good conscience, it should not be permitted to retain."[60] It held that the Selmaville district was entitled to imposition of a constructive trust and an order requiring the Salem district to return the tax funds it had erroneously received.

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[58] *Id.* at 1195.

[59] Selmaville Commun. Consol. School Dist. No. 10 v. Salem Elem. School Dist. No. 111, 421 N.E.2d 1087 (Ill. App. Ct. 1981).

6.3c Uses of Revenue

A case decided by the Supreme Court of Delaware involved a dispute about the relative contributions toward the cost of health care insurance premiums for state employees to be made by a school district and by the state.[61] The district contended that it contributions should be lower than the amount determined by the state treasurer and brought suit seeking construction of the statute governing health care insurance premiums for state employees. The trial court held in favor of the district and the state treasurer appealed. Because the statute in question was somewhat ambiguous, the Supreme Court of Delaware determined legislative intent by examining the synopsis and legislative history of the bill. The court reversed the lower court decision, holding that the district would be required to continue the contribution for which it was obligated by its contract with its employees, with the state paying the difference (up to 75 percent of the total cost of basic family coverage) between the amount paid by the school district and the full cost of comprehensive family coverage.

In a Pennsylvania case, a school district attempted to recover from its insurance carrier for amounts returned to taxpayers against whom the district had imposed an unlawful tax.[62] The insurer appealed from a previous decision holding it liable for the payments in question.[63] The district had attempted to levy a tax on the value of the occupations of persons residing in the district. The tax was later judged illegal and the district was required to return the taxes it had unlawfully collected. The district then sought to recover from its insurer an amount equal to the tax revenue it had illegally collected. The Supreme Court of Pennsylvania reversed the previous holdings. The court stated:

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[60] *Id.* at 1091.

[61] Carper v. New Castle Cty. Bd. of Educ., 432 A.2d 1202 (Del. 1981).

[62] Central Dauphin School Dist. v. American Casuality Co., 426 A.2d 94 (Pa. 1981).

[63] *See* YEARBOOK 1981 at 249-50.

> In our judgment, the public policy of this Commonwealth would be offended by permitting a political subdivision to use public funds to purchase "insurance" against court-ordered and statutorily-mandated refunding of taxes collected through an unlawful taxing measure. Were Central Dauphin's position to prevail, a school district or any other taxing body would have little reason, if any, to enact only lawful taxing measures. A district would be able to subject its citizens to an unlawful tax measure like the one imposed here, and yet in effect retain the proceeds of the unlawful tax simply by recovering on the claimed insurance coverage.
>
> Neither statutory authority nor our case law permits a device by which a school district's enactment of an unlawful tax provides the district with the same amount of revenue as if the tax were lawful. School districts may obtain revenues only from lawful taxing measures and legislative appropriations, not unlawful taxation and insurance proceeds....
>
> Because this Commonwealth's public policy does not permit a school district to make unlawful taxation just as revenue-productive as lawful taxation, it must be concluded that political subdivision's return of tax monies to its taxpayers collected by an unlawful tax is uninsurable. Hence there has been no "loss" within the meaning of the insurance policy and no claim lies against appellant.[64]

The Supreme Court of Appeals of West Virginia again considered issues concerning use of the proceeds of a special tax levy.[65] The members of a nonteaching employees association sought a declaratory judgment that they were entitled to be paid $55 per month in addition to the amount specified as the state minimum monthly salary. The voters of McDowell County in December, 1973, had authorized a special school levy that provided an additional $55 per month to each full-time nonteaching employee. In July, 1973, the West Virginia Code was amended and a higher minimum pay scale was established for auxiliary and service employees. The McDowell Board of Education continued to pay its nonteaching employees the additional $55 per month during 1974-75 but on July 1, 1975, it began applying the special levy funds to bring other employees' salaries up to a newly established state minimum. The nonteaching employees contended that under the terms of the special levy they were entitled to be paid the state minimum monthly salary plus an additional $55 per month. The supreme court of appeals had previously ruled in favor of the nonteaching employees,[66] but additional issues arose and the case was again before the court. It ruled that the McDowell County Board of Education was not entitled to assert the protection of sovereign immunity under the particular facts of the case. It also held that actions against the West Virginia State Board of Education, which was involved in the case as a third party defendant, could be brought only in the Circuit Court of Kanawha County and remanded the case for further proceedings.

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[64] Central Dauphin School Dist. v. American Casuality Co., 426 A.2d at 96-97.

[65] Thomas v. Board of Educ., Cty. of McDowell, 280 S.E.2d 816 (W. Va. 1981). *See* YEARBOOK 1981 at 255-56.

A taxpayer in Dade County, Florida, brought an action challenging the use of county school funds for the education of recently arrived refugee children.[67] The trial court dismissed the action and the plaintiff appealed. The appellate court affirmed the trial court's decision because it could find no constitutional or statutory provisions which expressly forbade such expenditures.

Two taxpayers brought an action against a Louisiana school board claiming that it improperly allocated sixteenth section funds only to schools located in the ward in which the sixteenth section lands were located.[68] The trial court ruled in favor of the school board and plaintiffs appealed. The court of appeal held that since the statutes required only that sixteenth section funds be deposited in a school board's general fund, a school board is free to change its policy and, at its discretion, spend all of the funds on schools in a single ward. The court observed that school boards comprised of elected officials have a great deal of discretion in determining how to spend money and suggested that the plaintiffs' remedy was in the political arena, not with the court.

A case decided in New York involved the provisions in a will establishing a scholarship fund for the benefit of bright and deserving "young men."[69] The decedent had bequeathed his entire estate to a school district and directed that the net income of the bequest was to be used to provide scholarships or grants for "bright and deserving young men who have graduated from the high school of such school district." He further directed that the recipients of such grants were to be selected by the board of education. Before any scholarships were awarded, the board of education became concerned with the legal ramifications of awarding such scholarships only to men. It requested that the will be given a construction which would permit the award of scholarships to both male and female students. The court, however,

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66. Thomas v. Board of Educ., Cty. of McDowell, 261 S.E.2d 66 (W. Va. 1979).
67. Tew v. School Bd. of Dade Cty., 389 So. 2d 1225 (Fla. Dist. Ct. App. 1980).
68. Cacioppo v. Tangipahoa Parish School Bd., 396 So. 2d 344 (La. Ct. App. 1981).
69. *In re* Will of Johnson, 439 N.Y.S.2d 250 (N.Y. Sup. Ct. 1981).

ruled that the purpose of the decedent was clearly set forth in the will; that the Fourteenth Amendment does not bar private discrimination; and that a restriction in the scholarship fund based on sex was not against declared federal policy and was educationally and socially beneficial to the community at large. The court recognized the difficulties inherent if the board of education were to administer the scholarship fund on the basis set forth in the will. Thus, it ordered that a trustee be selected to administer the scholarship fund in accord with the intent expressed in the will. The court also indicated that the trustee should solicit applications from graduating students and consider recommendations made by the board of education or the principal of the high school, but that the selection made by the trustee were to be independent actions.

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PROPERTY

Philip K. Piele and Margaret M. Johnson

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7.0 INTRODUCTION

Cases involving the detachment and attachment of land continue to dominate the property chapter with eleven cases reported, the same number summarized in last year's chapter. One case involving school board referenda raised the interesting question whether or not a state could issue bonds for the repair of a school building after voters in the district had twice rejected bond referenda for that purpose. In addition to the usual zoning, construction, and school closure cases, this year's chapter includes a case involving the providing of air conditioning for a multihandicapped elementary school student who could not control his body temperature and two cases in which the Ku Klux Klan sought award of attorney's fees for civil rights suits in connection with denial of the use of school facilities for patriotic meetings.

7.1 GENERAL SCHOOL BOARD AUTHORITY OVER SCHOOL PROPERTY MATTERS

The school board derives its authority to make decisions related to school property matters from state statutes. The courts generally tend to interpret these statutes broadly, thus giving boards considerable discretionary latitude to make decisions. Where the procedures for making such decisions are specified in the statutes, the courts will overturn decisions where these procedures were not followed. In South Dakota, for example, the statutes provide (1) that school boards have the power to establish and discontinue attendance centers (schools) by resolution; (2) that electors have the power to direct school boards to establish or discontinue an attendance center by holding a special election according to statutory regulations; and (3) that the school board may submit the question of discontinuing an attendance center to a vote of the people upon resolution of the board, and shall submit such questions upon requisite filing by electors. The passing of the resolution, the filing of petitions, and the holding of the special election are all to be accomplished before March 1.

A Sioux Falls school board passed a resolution to discontinue elementary classes at one school and to relocate special education programs to that school. The resolution was passed on April 14, 1980. Electors brought suit arguing that the adoption of the resolution was untimely because it was too late to allow filing of petitions and the holding of a special election by the statutory deadline. The trial court held in favor of the defendant school board's argument that the third section of the statute only applied to the second section, not to the first. The state supreme court overturned this ruling, stating that the three sections of the statute must be read together. The court held the action of the board was untimely and, therefore, illegal. The case was remanded to the trial court with instructions to enter a writ of prohibition.[1] One supreme court justice dissented, siding with the school board's argument.

7.2 DETACHMENT AND ATTACHMENT OF LAND

The trend in the increase in the number of detachment and attachment cases noted in the 1981 *Yearbook* continued in 1982. There were again eleven cases involving detachment and attachment issues, with the state of Illinois again leading the way with five of the eleven cases reported. Other states involved in detachment and attachment cases were North Dakota, Wisconsin, Ohio, Nebraska, and Washington.

Students from Killdeer School District in Dunn County, North Dakota, attended school in McKenzie County because that school was more easily accessible to their residence. Killdeer district paid tuition to McKenzie for those students. A public hearing was held to consider a petition requesting transfer of the land to McKenzie. McKenzie voted to disapprove the petition, while Dunn County voted approval. A motion was approved for Killdeer to retain all its assets and liabilities and for McKenzie's to be assumed by the annexed territory. Upon submission to the State Committee for Reorganization of Public School Districts (pursuant to state statute), the petition was approved. McKenzie appealed to district court, and the state committee decision was affirmed. On appeal, the state supreme court reversed the lower court decision because the state committee had neglected to determine whether the annexation proposal constituted an acceptable part of a comprehensive program for district reorganization as required by law. Since the supreme court ruled the state committee's decision did not comply with the law, it found that determining whether an equitable adjustment of property, assets, debts, and liabilities was involved would be unnecessary.[2]

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[1] Revier v. School Bd. of Sioux Falls, 300 N.W.2d 55 (S.D. 1981).

Electors, who were also parents and landowners in Wisconsin, petitioned to have their land detached from Beloit School District and annexed to Clinton. After more than sixty days, the Beloit School Board denied the petition. The parents then filed a similar petition, pursuant to another section of state statute, with the Cooperative Educational Services Agency (CESA). When the CESA approved the petition and ordered the detachment, Beloit appealed to the State Appeal Board. That board affirmed the CESA order, so Beloit filed an appeal with the courts. The circuit court held that the board had jurisdiction to make the order and had not acted in an arbitrary, capricious, or unreasonable manner in making its decision. Therefore, the board's decision must prevail.

Beloit filed another appeal. The Wisconsin Court of Appeals ruled that the CESA did not lack jurisdiction because the district had lost its jurisdiction by waiting more than the required sixty days to deny the petition. Therefore, no action was pending when the petition was filed with the CESA. In answer to Beloit's charge that the board's consideration of the children's emotional problems was irrelevant to consideration of their "educational welfare," the court ruled "it is meaningless to deliver education to a child who cannot learn." Therefore, the board had a rational and reasonable basis for its decision. The lower court judgment was affirmed on all counts.[3]

Marion City School District in Ohio requested a transfer to its district of proprety previously annexed to three adjacent school districts. The state board of education denied the request. When, through the appeal process, the case reached the Ohio Supreme Court, that court upheld the lower court decision that the disapproval of requested property transfer was a legislative act and as such could not be appealed to the common pleas court.[4] The supreme court stated that prior cases established the precedence that "quasi-legislative" acts are not susceptible to judicial review. A dissenting justice asserted that use of the words "legislative act" in an Ohio case that was heavily relied on in this decision pointed to the broad delegation of power to the state board of education, but did not mean that state board action in approving or disapproving requested transfers was part of the legislative process.

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[2] McKenzie Cty. School Dist. No. 1 v. State Bd. of Pub. School Educ., 311 N.W.2d 167 (N.D. 1981).

[3] City of Beloit v. State Appeal Bd., 309 N.W.2d 392 (Wis. Ct. App. 1981).

After learning that his recently purchased land was located in another school district than he thought, a Saunders County, Nebraska, landowner filed suit to have the 1969 freehold land transfer declared invalid. The county district court overruled his motion and granted the defendant district's motion to dismiss his petition. The landowner appealed alleging the district court had erred on several counts. In affirming the lower court's judgment, the Nebraska Supreme Court ruled that (1) the 1969 judgment of the freehold board was final and could not be collaterally attacked because no evidence was produced to void the judgment or prove any lack of jurisdiction; (2) the freehold board did not require prior approval of the county board for the transfer; (3) the repeal and reenactment of the statute governing transfers before the 1969 hearing did not require refiling the petition, so the decision was valid; and (4) county officials were not estopped by unauthorized acts by employees, *e.g.*, erroneously informing the landowner as to which district the land was in.[5]

A statutory board granted the transfer of a family's property from a Lewiston School District in Pawnee County, Nebraska, to Filley District in another county. Lewiston appealed to district court, which upheld the statutory board's decision. The Lewiston district then appealed to the Nebraska Supreme Court on the grounds that (1) the transfer was void because at the time it was authorized, Filley was not accredited as required by state statute; and (2) the parents had not proved the transfer met their children's best educative interests. The supreme court upheld the lower court's ruling on both counts.[6] Filley had met all requirements for accreditation, but had not received formal notification at the time of the transfer. However, such notification had taken place before school started and before Lewiston entered its appeal. The court ruled that justice would not be served if the transfer were not allowed for such a technicality. As to the second charge, the court cited several factors, such as the family's proximity to Filley and a lower teacher-student ratio at Filley, that evidenced Filley's ability to serve the best educative interests of the children involved.

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[4] Board of Educ. of Marion City School Dist. v. Board of Educ. of Elgin Local School Dist., 420 N.E.2d 990 (Ohio 1981).

[5] Schilke v. School Dist. No. 105, 299 N.W.2d 527 (Neb. 1980).

[6] Miller v. School Dist. No. 69 of Pawnee Cty., 303 N.W.2d 483 (Neb. 1981).

More than 90 percent of the registered voters in an area of Massac County, Illinois, signed a petition requesting that the territory be detached from a recently formed unit district (K-12) and annexed to the elementary and secondary districts where the area had been assigned prior to formation of the unit district. After holding hearings, the Regional Board of School Trustees voted to deny the petition. Petitioners sought judicial review. The circuit court remanded the case to the regional board, directing that two additional findings of fact be made: (1) that the detachment would not result in financial detriment to the unit district; and (2) that the detachment and annexation would benefit the high school district.

The unit district challenged the remand order in the Illinois Appellate Court. The appellate court affirmed the order, finding that the trial court correctly directed the board to find that no serious detriment existed because the unit district would still be operating with a surplus of funds.

After rehearing the petition in compliance with the court's order, the regional board granted the petition. The unit district then appealed this decision to the circuit court, which affirmed the board's second decision. On appeal to the appellate court, the district argued that the case should not have been remanded and that the first decision was not against the manifest weight of the evidence. The appellate court affirmed all orders of the circuit court. The court held that the remand order was proper because the board's original findings were against the manifest weight of the evidence, and the later decision granting the petition was not contrary to that evidence.[7]

A petition was filed on behalf of six individuals to detach an area of land that included their three residences from Pearl City, Illinois School District and attach it to Freeport School District. Only three children (all from one family) were affected by the action. The petitioners without children had signed as a favor to assist the children's parents in gaining approval of the annexation. Following a hearing, the Regional Board of School Trustees granted approval. The school board in Pearl City filed a complaint asking the circuit court to reverse the board's decision. The district argued that the decision was not valid because a written report detailing financial and educational effects on the districts involved had not been filed prior to the hearing as required by state statute. The district also alleged that the decision had been improperly made based solely on the personal desires of the petitioner without regard to district interests. When the circuit court affirmed the board's decision, the district appealed. In affirming the lower court decision, the appellate court stated that the benefit to the students involved might be considerable while the detriment to the schools and communities would be insignificant. Therefore, the decision of the administrative agency did not go against the manifest weight of the evidence and must be upheld.[8]

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[7] Burnett v. Massac Commun. Unit Dist. No. 1, 421 N.E.2d 941 (Ill. App. Ct. 1981).

A family in Grundy County, Illinois, filed a petition to detach twenty acres of their land (including their homesite) from Braceville Elementary District and Garner South Wilmington High School District and annex it to Coal City Community Unit School District. They had already enrolled their children in school in Coal City by establishing residency through the children's grandmother. When the Regional Board of School Trustees denied the petition after a hearing, the parents filed for administrative review. The circuit court reversed the regional board's order, finding it contrary to the manifest weight of the evidence and holding the schools' and pupils' best interests would be served if the petition were granted.

The districts appealed. The appellate court affirmed the lower court decision. The court stated the loss of revenue to the districts from which the land would be detached would not substantially affect their program quality or financial stability. The court also ruled the benefits to the children were greater by attending school in Coal City.[9]

One justice dissented, saying that, because the regional board had set forth no findings of fact, the proper course for the court would be to remand the decision to that agency to carry out that function. The only alternative, suggested the dissenting justice, should be approval of the board's petition, because without findings of fact, the board's findings would have to be presumed true and correct.

When several Ogle County, Illinois, parents learned the local elementary school was to close and their children would transfer to the Oregon Community School District, they petitioned to have the area detached from Oregon district and annexed to King and Rochelle districts. The Regional Board of School Trustees denied their petition, so they appealed to the circuit court where the judgment was reversed. The regional board then appealed to the Illinois Appellate Court. The appellate court held that no significant impact would be felt by either district, and an advantage would definitely be felt by the students involved. Therefore, the court ruled, the board's decision went against the manifest weight of the evidence and the circuit court's ruling must be upheld.[10]

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[8] Board of Educ. of Regional Bd. of School Trustees of Stephenson Cty., 424 N.E.2d 808 (Ill. App. Ct. 1981).

[9] Francois v. Regional Bd. of School Trustees, 424 N.E.2d 617 (Ill. App. Ct. 1981).

The benefit to the children involved was also the deciding factor in an annexation case in Kankakee County, Illinois. A hearing board appointed to consider the initial petition denied the request for detaching one residential lot from Herscher Community Unit District and annexing it to Kankakee district. Upon administrative review, the circuit court reversed the hearing board's decision. Herscher district appealed. The appellate court affirmed the circuit court judgment, holding that no harm would result to either district and the best interests of the children involved would be served if the detachment were carried out. The court further stated that the earlier cases whose decisions were contrary to this had been substantially eroded by subsequent statutory and case law. Additionally, the court discounted the district's argument that the action would result in irregular boundaries causing the district not to be compact and contiguous as required by statute. The court cited an earlier decision that contiguity or compactness was not a problem unless children could not reasonably avail themselves of school privileges.[11]

Evergreen School District in Washington petitioned to annex a parcel of commerically zoned land from another district. It was argued that granting the proposed action would help equalize educational opportunities between the districts without requiring pupil transfers. The county committee held hearings then met to decide on the proposal. The committee voted against the transfer after discussing the evidence presented relevant to each of eight factors specified in state statutes governing transfer of property.

Evergreen district asked the superior court for mandamus based on a charge that the hearings violated the appearance of fairness doctrine because a member of the other district's school board participated as a member of the county committee. The superior court dismissed the action, finding that the committee had fulfilled its statutory duty as a quasi-legislative action and was thus not subject to the appearance of fairness doctrine. On appeal, the court of appeals ruled that a writ of mandamus could not be issued unless the record showed a complete disregard for statutory guidelines. Because the county committee had considered all factors, the lower court's refusal of mandamus was upheld. Likewise, the decision that the appearance of fairness doctrine did not apply was affirmed, using similar reasoning to that used by the lower court.[12]

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[10] Manning v. Regional Bd. of School Trustees, 416 N.E.2d 381 (Ill. App. Ct. 1981).
[11] Wirth v. Green, 420 N.E.2d 1200 (Ill. App. Ct. 1981).

7.3 SCHOOL BOND REFERENDA

Four cases dealing with school bond referenda were reported this year, double the number reported in last year's *Yearbook*. But unlike last year when the cases were more or less routine taxpayer challenges to successful passage of school bond measures, one case, at least, raised an interesting question whether a state could issue bonds for the repair of a severely deteriorating school building after voters in the district had twice rejected bond referenda for that purpose.

When the Allentown, New Jersey, high school in Upper Freehold School District deteriorated to the point of potential danger of injury and considerable inconvenience to students and faculty, the school board arranged for a referendum seeking approval of a bond issue sufficient to repair the facility. The voters rejected the proposal, so school continued for that school year. In the spring another bond issue proposal met with voter rejection. In spite of temporary repairs, the building continued to pose potential dangers so severe that the liability insurance carrier reduced coverage and threatened cancellation if repairs were not completed immediately.

The school board petitioned the State Commissioner of Education, pursuant to New Jersey statute for an order to issue the necessary bonds. The commissioner adopted the findings of fact and conclusions of law of an administrative law judge to whom the matter had been referred. In doing so, he directed "the issuance of school district bonds . . . for a capital project to replace the roof . . . and necessary attendant repairs."

The two main municipalities sending students to the high school appealed the decision to the State Board of Education, where the commissioner's decision was affirmed. Because bond counsel informed the district they could not issue a favorable opinion on the validity of bonds issued pursuant to an order of the state board after voter rejection, the district filed a notice of appeal to obtain an order from the courts. The superior court, appellate division denied the appeal because the school board had not been disadvantaged by the state board's decision. However, that court granted a motion of the state board and directed issuance of the bonds. The local board filed a petition for certification, which was granted. The supreme court, appellate division reversed the order dismissing the local board's appeal and reinstated the order directing issuance of bonds. The court held that the commissioner and the state board had the power to direct such bond issuance after voter rejection because of their constitutional and statutory obligation "to provide a thorough and efficient education."[13]

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[12] Evergreen School Dist. No. 114, Clark Cty. v. Clark Cty. Comm. on School Dist. Organization, 621 P.2d 770 (Wash. Ct. App. 1981).

A private, nonprofit organization brought suit challenging the validity of a bond election conducted by the Elysian Fields, Texas School Board. The trial court first judged that the nonprofit corporation was without standing to maintain the suit. However, the court also ruled on the validity of the election, finding no irregularities affecting the outcome. On appeal, the court of appeals for Texas overruled all points of error charged by the organization and affirmed the lower court judgment.[14]

Citizens in Logan County, Colorado challenged the validity of a school bond election on several counts: (1) voters were allowed to mark ballots in pencil rather than ink or indelible pencil, (2) ballots of unqualified voters were received, (3) the ballot failed to separate a question concerning construction of a junior high school from that of construction of an elementary school located elsewhere, (4) a citizen's committee favoring the measure received financial assistance from the district for mailing brochures in support of the election, (5) county registration books were used without proper contract with the county clerk, and (6) designation of precinct boundaries in the district's election notice was insufficient.

The trial court dismissed four of the six claims for insufficient evidence. At that point, plaintiffs filed a motion to amend their complaints, but it was denied. The trial court further granted summary judgment against the plaintiffs on their challenge of the adequacy of the election notice and granted the board's motion to dismiss the charge relating to financial subsidy of the citizen's support committee. The plaintiffs appealed all the lower court decisions. However, the Colorado Supreme Court affirmed each decision, citing insufficient evidence that any of the alleged violations would have significantly affected the outcome of the election.[15]

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[13] *In re* Upper Freehold Regional School Dist., 430 A.2d 905 (N.J. 1981).

[14] Concerned Citizens for Better Educ. v. Woodley, 623 S.W.2d 488 (Tex. Ct. App. 1981).

[15] Abts v. Board of Educ. of School Dist. RE-1, 622 P.2d 518 (Colo. 1981).

The Independent School District in Woodward County, Oklahoma, held a bond issue election submitting a single proposal to authorize construction of two new buildings. The issue was defeated. Two months later, the district called for another election offering three separate proposals for construction of three buildings, two of which had been included together in the single proposal that was previously defeated. A qualified voter brought suit to enjoin the second election arguing that holding it violated state statute prohibiting resubmission of the "same proposition" within four months of its defeat. The voter contended the propositions in the second election were substantially the same in form and substance as those in the first because the bonded-indebtedness limit was essentially the same and most of the funds were to go to building a new high school and gymnasium. The trial court denied injunctive relief and rendered declaratory judgment for the school board. The Supreme Court of Oklahoma affirmed the lower court decision, asserting that the two proposals were substantially different in that the second allowed voters to reduce the economic effect by providing three options from which to choose whereas the first proposal only allowed one option.[16]

7.4 ZONING ISSUES

In a case of first impression of the effect of relevant sections of the state education law on local zoning ordinances, the Supreme Court of Onandaga County, New York, denied the Village of Camillus' request for an injunction against the tenants of an unused school building. The plaintiff village contended that because the school was located in a residential district, it could not be rented unless the lessees applied for and received a variance. The lessees refused to apply for a variance as they did not wish to become involved in interactions between the town and the school district. The village petitioned the court for an injunction. The defendants (lessees) argued that (1) they were immune from the zoning law, and (2) the law was invalid. The village contended that because a school district's function is education, the leasing of the building constituted a proprietary activity subject to the zoning law. The court ruled that due to shrinking enrollments, districts have been forced to maintain a vast number of vacant school buildings. Therefore, if the board deemed leasing to be in the best interest of the district, it was a governmental interest. As such it was immune from zoning laws.[17] The court cited alternative courses of action the community could take if leasing school buildings adversely affected the community, which in this case it had not.

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[16] Baird v. Independent School Dist. No. 3, 622 P.2d 1072 (Okla. 1981).

[17] Village of Camillus v. West Side Gymnastics, 440 N.Y.S.2d 882 (Sup. Ct. 1981).

7.5 BIDS FOR BUILDING CONSTRUCTION AND RENOVATION

7.5a Involving Architects

In Indiana, an architectural firm was hired by a local school corporation to furnish basic architectural services in connection with the renovation and construction of certain schools under a contract that paid the firm a percentage of the project cost, which was to include all work except the payment to the architect. This contract was later awarded to provide for coordination and onsite supervision of the project, the fee for which was to be included in the project construction cost. After an audit by the State Board of Accounts determined that the school corporation had overpaid the architectural firm, the State of Indiana brought suit against the firm to recover the funds allegedly overpaid.

When the trial court found in favor of the firm, the state appealed, essentially arguing that the services performed by the firm, *i.e.*, construction management, under terms of the addendum should have been open to public bid. The court of appeals disagreed and affirmed the judgment of the lower court, which found that the additional services were considered professional services and therefore not subject to competitive bid under Indiana law.[18]

7.5b Involving Contractors

In Pennsylvania, a school district solicited bids for the construction of a junior-senior high school. When the apparent low bidder for the general construction failed to execute a final contract with the district, the district rebid that portion of the project and awarded the contract to another company. The district then brought action to recover liquidated damages on the bid bond executed by the original low bidder. The general contractor and indemnity company moved for summary judgment, contending that the district did not adhere to the method outlined in the bid instructions for awarding contracts and that such deviation precluded any default on the bond.

The United States district court granted summary judgment, holding that although a contractor may not normally withdraw a proposal without forfeiting its bond (the "firm bid rule"), such a default cannot occur until the conditions of forfeiture "ripen" sufficiently to justify default.[19] These conditions included the school district following the bid instructions for awarding the contract. Because of the school district's failure to mail a required letter containing instructions for proper execution of the contract documents, bonds, and insurance—a crucial step in the awarding of the contract—the conditions for forfeiture of the bond did not "ripen" and therefore the district was not entitled to recover on the contractor's bid bond.

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[18] State of Indiana v. Brown, 422 N.E.2d 1254 (Ind. App. 1981).

In Indiana, a construction company, whose bids on several different construction projects involving additions to two elementary schools in Muncie were rejected by the school district, brought suit against the district alleging it had violated the state building statute requiring all public construction contracts in excess of $5,000 to be let for competitive bids by entering into a construction manager contract without submitting it for bids. The contract was awarded to an engineering firm after a series of interviews with various architectural and engineering firms. When the circuit court found for the school district, the construction company appealed, arguing that the district lacked the authority to enter into a construction manager contract without submitting it to public bids.

In affirming the trial court's ruling, the court of appeals held that because the services performed by the construction manager were similar to those of an architect or engineer, which require professional or scientific skills and experience not subject to objective evaluation, the contracts for such services entered into by the school district were not governed by public competitive bidding laws.[20]

One judge dissented, arguing that the contract should be declared invalid because school districts possess only those powers expressly given them or implied therefrom and since the statute governing bids for public construction contracts does not mention construction managers as being exempt from such bidding, the interest of the legislature was being overridden by the majority ruling in this case, particularly since a bill to amend the statute to allow schools to hire project consultants with duties similar to those of construction managers failed to win approval in the State General Assembly.

In California, general contractors who had the lowest bid on a school construction project falling under a California education code, which required school districts to award contracts for work of more than $12,000 to the "lowest responsible bidder," brought suit for damages under U.S.C. §§ 1981 and 1983 in federal district court against the Oakland School District, the school board, and several individual board members, when they were denied the contract because of the district's policy of requiring a contractor on a project over $100,000 to use minority-owned businesses for at least 25 percent of the total in compliance with an affirmative action plan. The minority-owned company included in the low-bidder proposal would receive approximately 16 percent of the total amount of the project. The contractors alleged that the district's affirmative action plan for construction violated the state education code on school construction bids and the equal protection clause of the Fourteenth Amendment.

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[19] Hanover Area School Dist. v. Sarkisian Bros., 514 F. Supp. 697 (M.D. Pa. 1981).
[20] Attlin Constr. v. Muncie Commun. Schools, 413 N.E.2d 281 (Ind. App. 1981).

The district court held that because the defendants acted in good faith in adopting and implementing the affirmative action plan, they were immune from damages for such actions, and, therefore, the court granted the district summary judgment. The general contractors appealed. In affirming the judgment of the district court, the Ninth Circuit Court of Appeals held, among other things, that absent a showing of actions taken in bad faith, the board members were entitled to qualified good faith immunity for money damages under U.S.C. § 1983 and that the Oakland affirmative action plan was constitutional. The court refused to rule on the question whether money damages would be available to the contractors if violation of state law were found.[21]

7.6 SCHOOL CLOSURES

When the Supreme Court of Erie County, New York, denied a motion to dismiss a petition for review of Olean City School District's decision to close an elementary school, the district appealed. The supreme court, appellate division reversed the order in a memorandum decision, holding that the petitioner's exclusive remedy for challenging the board's decision was an appeal to the Commissioner of Education because it did not raise a constitutional or statutory issue or a discrete question of law. The court dismissed the petition "without prejudice to any administrative action deemed advisable."[22]

The school board's authority to close a school whose age and physical deterioration has created unsafe conditions for students is seldom challenged by parents unless the closure might adversely affect a district desegregation plan. Such was indeed the cause of action in

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[21] Schmidt v. Oakland Unified School Dist., 662 F.2d 550 (9th Cir. 1981).

[22] Walker v. Board of Educ. of Olean City School Dist., 433 N.Y.S.2d 660 (N.Y. App. Div. 1980).

Pennsylvania where the Third Circuit Court of Appeals considered a case in which a class of black elementary school students and their parents appealed a district court decision that had rejected plaintiff's claim that closing the only elementary school in a primarily black neighborhood in Darby Township placed an unconstitutionally undue burden on the black students. In deciding the case, the circuit court stated that because the district had previously maintained a dual school system, it now had a "heavy burden" of demonstrating nonracial motivation in closing the predominantly black school.

The court held that the district court correctly evaluated the case using standards set forth in a Tenth Circuit decision in 1978. The school's age, deterioration, and unsafe physical condition led the court to hold that the school would have been closed anyway.[23] "The goal of achieving a fair and reasonably unburdensome desegregation plan does not oblige a school board to maintain or rehabilitate an unsafe and physically obsolescent school, especially when adequate and spacious schools are nearby," said the court.[24]

The Supreme Court of Kansas construed certain sections of Kansas statutes to require that school boards in districts resulting from disorganizing or merging other districts must have consent of a majority of voters in the disorganized district area before such school boards may close or reduce grade usage at any school building formerly the property of the disorganized district. This ruling stemmed from an action brought to enjoin a unified school district in Reno County from holding an election to reduce the grade usage at an elementary school (formerly part of a disorganized district that had joined the unified district) from six elementary grades to two elementary grades. The trial court, in denying the request for an injunction, held that an election in such cases was not only permissible but mandatory under state statutory provisions. On appeal, the supreme court affirmed the lower court decision. In offering its opinion, the supreme court held that if the school board had the authority to hold an election to determine whether a school should be closed (thereby reducing grade usage to zero), then it clearly had the authority to hold an election to reduce grade usage offered at the facility to less than six elementary grades without closing the school completely.[25]

7.7 FACILITIES FOR HANDICAPPED STUDENTS

At the annual review of a Brownsville, Texas, multihandicapped child's individualized education program and placement, it was recommended that he be placed the next school year in a regular class to be educated with nonhandicapped children. His current placement at a school for handicapped children was considered "too restrictive to meet [his] intellectual and social needs." Because the child could not adequately control his body temperature, the placement committee unanimously recommended an "air-conditioned classroom." However, school officials constructed a five-foot by five-foot plexiglass cubicle with a window air conditioner and placed it in a regular classroom to avoid the cost of air conditioning the room. School officials felt that parents of nonhandicapped children would demand air conditioning in other classrooms if it were provided in one room.

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[23] Mitchell v. McCunney, 651 F.2d 183 (3d Cir. 1981).

[24] *Id.* at 189.

[25] Hobart v. Board of Educ. of Unified School Dist., 634 P.2d 1088 (Kan. 1981).

During the first few months of that school year, the child's parents filed a request for a due process hearing. The impartial hearing officer ruled in favor of the district. That decision was affirmed on appeal to the state board of education. After a motion for rehearing was denied by the state board, the parents filed suit in federal district court seeking declaratory and injunctive relief and damages alleging the district had failed to provide an education in the "least restrictive environment appropriate to [the child's] individual needs." In a memorandum and order, the court granted the motion for preliminary injunction, saying the plaintiffs demonstrated a likelihood of success under the Education for All Handicapped Children Act of 1975 (Public Law 94-142).[26] The court declared that the district had the responsibility and ability to provide an appropriate education and ordered that the district was enjoined from denying appropriate education by requiring the child to attend class in an air-conditioned cubicle rather than an air-conditioned classroom. The court stated, "With the possible exception of a child whose immunological system requires that he or she be kept within a sterile atmosphere, education within a cubicle will hardly ever be appropriate."[27]

7.8 USE OF SCHOOL BUILDINGS BY COMMUNITY GROUPS

The question whether attorney's fees could be assessed against a local school district or the federal government for violation of the civil rights of Ku Klux Klan units denied use of school facilities for patriotic meetings was decided in two cases reported in 1981.

When a Mississippi school board denied a request by a Ku Klux Klan unit to use a school facility for an "Americanism Rally," the unit and two of its officers filed a civil rights suit. After the trial, but before judgment, the judge suggested the plaintiffs reapply to use the school facility assuring the district they would post a bond for damages and would not burn crosses, carry firearms, or wear hooded robes. Upon complying with the judge's suggestion, the unit was granted permission by the school board. However, the K.K.K. unit moved for allowance of attorney's fees in excess of $8,000. The district court held that the plaintiffs were "technically" the prevailing parties, and as such were entitled to fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. The plaintiffs were awarded nominal fees of $100 and appealed, contending the amount was too low. The court of appeals affirmed the lower court's nominal award, saying the only error had been in using the terminology, "technical prevailing party."[28] The court further stated the lower court had actually based its decision on the "special circumstance" that it was the plaintiffs, not the defendants, who acceded to the other parties' terms. Therefore, the lower court as not obligated to award any attorney's fees, but did not err in granting nominal fees.

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[26] Espino v. Besteiro, 520 F. Supp. 904 (S.D. Tex. 1981).

[27] *Id.* at 914.

When a Louisiana school board granted permission for the Ku Klux Klan (K.K.K.) to use a school facility for a "patriotic" meeting, a branch office chief for the United States Department of Health, Eduction, and Welfare (HEW) threatened the district with loss of all its federal financial assistance for violation of certain federal regulations. The school board then rescinded its permission to the K.K.K. The next day, the HEW representative acknowledged that if the facility use involved First Amendment rights, no federal program enforcement action could be taken. However, the school board took no action to reverse its cancellation of the activity.

The K.K.K. filed a civil rights suit against the school board and HEW challenging a school board policy (adopted in response to the above situation) that prohibited use of school facilities by groups advocating racial discrimination. The district court denied plaintiff's motion for preliminary and permanent injunctive relief and dismissed the action. That decision was reversed and remanded by the Fifth Circuit Court of Appeals. The district court (on remand) then entered an order setting nondiscriminatory guidelines for the school board and permanently enjoining HEW from interfering in like situations. Costs of the proceedings were to be taxed against HEW. HEW was also assessed attorney's fees of $11,920.41, while the school board was expressly released from such liability. HEW appealed, and the plaintiff cross-appealed the release from liability. The court of appeals reversed the assessment against HEW, saying no supporting precedent existed for recovering attorney's fees from the federal government in this type of situation. That court then reversed the lower court's exemption of the school board and remanded the case to determine what amount, if any, should be reasonably assessed against the school board.[29] The court of appeals stated that the original assessment was not necessarily reasonable for the board to pay.

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[28] Coen v. Harrison Cty. School Bd., 638 F.2d 24 (5th Cir. 1981).

One justice concurred with the decision favoring award of attorney's fees against the school board. However, that justice dissented from the part of the decision that found HEW immune from such fees.

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[29] Knights of K.K.K. v. East Baton Rouge Parish School Bd., 643 F.2d 1034 (5th Cir. 1981).

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8

HIGHER EDUCATION

D. Parker Young and Donald D. Gehring

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8.0 INTRODUCTION

Each year it appears that there is an ever-increasing number of court decisions relating to higher education. This past year is no exception. Higher education merely mirrors what is happening in society and the fact that these are very legalistic times is underscored by the frequent use of the judiciary for the resolution of conflicts and final decisions regarding most important matters.

Since there is a proliferation of court decisions relating to higher education, only the most pertinent and significant ones will be discussed in this chapter. The cases selected are those which seem to best illustrate the legal parameters regarding the specific topic.

8.1 GOVERNANCE AND FINANCE

The United States Constitution does not contain any statement regarding education. Therefore, education is recognized as a state function. The manner in which education is structured, governed, and financed is within the discretion of the individual states as long as no state or federal law or constitutional provision is violated.

Private institutions are not subjected to the same federal constitutional standards as are public institutions. However, the private institution must adhere to valid state and federal laws. During the past year, a significant court decision concerning both governance and finance arose on a private university campus.

Bob Jones University, a private university, unaffiliated with any religious denomination, but maintaining a fundamentalist orientation in its educational program, brought suit against the federal government to recover $21.00 paid pursuant to the Federal Unemployment Tax Act. The university's claim to refund was based upon its allegation that it is tax exempt under § 501(c)(3) of the Internal Revenue Code. The United States counterclaimed against Bob Jones for unemployment taxes for the tax years 1971 through 1975 in the amount of $489,675.59 plus interest.

The dispute between the university and the Internal Revenue Service focused on IRS's position that its revenue rulings, beginning in 1971, denied tax exempt status under the above section of the Code to a private school which discriminates on the basis of race in its programs and facilities. The IRS argued that Bob Jones University is subject to the revenue procedures prohibiting race discrimination in private schools, and the revenue rulings contained no exemption for "religion-based schools."

The specific discrimination of concern to the government originated prior to 1971, when the university completely excluded blacks from eligibility for admission. From 1971 to 1975, the university rejected applications from unmarried black students, with certain exceptions. Later, the university permitted unmarried blacks to enroll, but instituted a policy requiring the expulsion of students who interracially married or dated outside their own race.

The United States Court of Appeals for the Fourth Circuit ruled that the IRS does have the authority to deny tax exempt status under § 501(c)(3) to the university because of its policies of racial discrimination, and the denial of tax exempt status is consistent with the First Amendment.

The court determined that the United States Supreme Court has established that entitlement to a charitable exemption under § 501(c)(3) requires that an institution to be operated consistent with public policy and that the university's racial policies violate the public policy against race discrimination. Moreover, to permit a tax exemption would violate federal government policy against the subsidization of racial discrimination in education (including private education). Although the university's policies, at least after May 1975, appear to be racially neutral, the court held that they constitute racial discrimination in that they ban interracial affiliation.

Rejecting the university's claim that the IRS's nondiscrimination policy violates the university's right to practice its religion, the court said that a university's interest in this regard must be balanced against the compelling governmental interest in eliminating all vestiges of racial discrimination in public and private education. Considering the deeply rooted constitutional prohibitions against this form of discrimination, the court said that the university's interest must be subordinate. Such a tipping of the scales in favor of the government's policy against discrimination (and therefore denial of the exemption) does not prevent the university from teaching the scriptural doctrine of nonmiscegenation; moreover, no individual student at the university is forced to violate his beliefs. Such factors reinforce the enforcement of the policy against nondiscrimination.

Finally, the court rejected the university's contention that the government's position amounted to the establishment of a religion. First, the court held that the government's compelling interest in protecting against racial discrimination must outweigh any incidental favoring of religions which are in accord with such public policy. Moreover, the court held, the establishment clause of the First Amendment does not prevent the government from enforcing a fundamental constitutional and societal value by means of uniform policy, equitably applied to all affected institutions, including all religiously operated schools.[1]

8.2 LIABILITY

Consumerism abounds throughout this country today and the ultimate in consumerism on campus is the liability which faces both institutions and individuals. Three reported cases during the past year are worthy of discussion.

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[1] Bob Jones Univ. v. United States, 639 F.2d 147 (4th Cir. 1981).

A student at the University of Texas at Arlington sued the university for injuries he sustained when he slipped and fell on a university parking lot. He had paid the university a fee to use the lot and alleged that he was therefore a business invitee. He alleged that the university was negligent in maintaining the parking lot in a slippery, iced-over, dangerous condition that created an unreasonable risk of injury to business invitees, including himself. He also claimed that the university was negligent in requiring him to attend classes under the dangerous conditions created by the icy and slippery condition of the premises.

At the jury trial, the jury found that the university was negligent and that the proximate cause was the university's failure to cancel classes on the day in question and as well as failing to salt or sand the parking lot. The university appealed that verdict claiming that whether the classes should have been cancelled on the day in question was an act of discretion on the part of a state governmental unit and therefore, under the Texas Tort Claims Act, it was excluded from liability for the injuries of the student.

The Court of Civil Appeals of Texas agreed, noting that the university had established a policy in regard to cancelling classes and that on the day in question that policy and procedure was followed. It then declared that the university administration had the discretion to determine whether or not to cancel classes on the day in question. It further ruled that the university could not be liable for any injuries sustained by the student on the way from his apartment to his classes since this would extend the university's liability beyond that intended by the Texas Tort Claims Act. Finally, the court declares that the purpose of section 14(7) of the Act, which excludes liability for all claims based on a government's failure to perform an act when the law leaves performance of the Act to the discretion of the government, was to avoid a judicial review that would question the wisdom of a government's exercise of discretion in making policy decisions.[2]

In another important case, a student at California Polytechnic State University brought suit against the trustees and two resident assistants. She was seriously injured when the car in which she was a passanger collided with another and overturned after leaving the highway. The accident occurred during a "speed contest" involving students, many of whom were under the legal drinking age and who had earlier been engaged in heavy drinking in the residence hall. The plaintiff and the other students lived in the residence halls. The license agreement for the residence halls prohibited the possession or consumption of alcoholic beverages.

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[2] University of Texas at Arlington v. Akers, 607 S.W.2d 283 (Tex. Civ. App. 1980).

The student alleged that the resident assistants "knowingly permitted" the possession and consumption of alcoholic beverages in violation of the license agreement and this failure to perform their duty to enforce the rules caused a dangerous condition to exist. She also alleged that by failing to enforce the rules, the defendants "caused to be furnished" alcoholic beverages to persons under the legal drinking age. This failure to enforce the rules also breached the residence hall contract and failed to warn students of the hazard.

The California Court of Appeal ruled that, under California law, neither an institution nor its resident assistants are liable for injuries sustained by a student involved in an automobile accident after heavy drinking in a residence hall, even though the resident assistants are generally aware that drinking takes place in the halls in violation of the residence hall agreement.

Two of the student's complaints were based upon the university's failure to enforce the rules. This is nonfeasance (failure to act) as opposed to misfeasance (taking action improperly). The court noted that in a cause of action based upon nonfeasance, liability could only be attached to the university if it had a "special relationship" to the students. Thus, the court first explored the question of whether such a "special relationship" existed that would have imposed upon the university the duty to take action to prevent the injury sustained. In other instances where one individual created a dependancy on the part of the injured individual, the courts have found a "special relationship" to exist. The relationship between a therapist and a client with dangerous propensities was also noted as a "special relationship" creating a duty to act. However, in this case the court could not find that the residence hall license agreement upon which the student relied formed the basis for the existence of a "special relationship." The court further ruled that even when such a "special relationship" exists, the harm must be forseeable and "the risk of harm sufficiently high to bring the duty into existence...." The court also found " a lack of a close connection between the failure of the trustees and dormitory advisors to control on-campus drinking and the speed contest."

Responding to the student's argument that by allowing the consumption of alcoholic beverages to take place, in contravention of the rules, the university created a "dangerous condition" which resulted in her injury, the court noted that the statute pertaining to "dangerous conditions" generally referred to a defect in physical conditions. However, where there is notice to a landlord that third party conduct might result in injury, liability could attach. "However the conduct of students, without known violent propensities and without knowledge that they would drink to excess and thereafter operate motor vehicles, does not rise to the level of forseeable harm as does a case where the tenant has a known vicious dog or where he uses rented property as a firing range." Finally, the court held that "the breach of the license agreement by one student imposes no contractual duty upon the trustees in regard to another student."[3]

In the third significant case, a Southern University student was shot by a nonstudent in the lobby of her dormitory. The assailant, who was unknown to the student, had been sitting quietly in the lobby for approximately one-half hour and suddenly, without warning or provocation, pulled a revolver and shot the student as she awaited an elevator.

The student brought action against the university alleging that it had breached its duty to protect her in three respects: (1) by requiring her to live on campus without warning her of the dangers to which she would be subjected; (2) by failing to maintain an adequate police force and to establish a security monitoring post; and (3) by failing to bar her assailant from the campus.

The university had claimed that, although there had been some isolated incidents of violence on campus in the past, this was insufficient to require that it warn all incoming dormitory students of probable danger from criminal assault.

The Court of Appeal of Louisiana held that, under the circumstances, the university was not liable. It noted that there was no proof that living on campus increased the hazard of danger from criminal assault above the ordinary. The court reasoned that the failure to implement a given level of security protection is not a proximate cause of a particular act where the event might have occurred in spite of utmost security precautions. It declared that "Even the most sophisticated security forces are powerless to prevent a spontaneous, sudden and unprovoked act of violence." Finally, the court noted that there was no evidence in the record that the university was aware of the assailant's dangerous propensities.[4]

8.3 EMPLOYEES

Each year there are more cases reported dealing with employees than any other topic. This past year is no exception. The cases reported deal with every aspect of employment, however, due to space limitations only a representative number of the more significant decisions are discussed.

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[3] Baldwin v. Zoradi, 176 Cal. Rptr. 809 (Cal. Ct. App. 1981).

[4] Hall v. Board of Supervisors, Southern Univ., 405 So. 2d 1125 (La. App. Ct. 1981).

8.3a First Amendment Rights

Employees in public institutions may not be punished in any way just becuase they exercise their basic constitutional rights. This is especially true when employees exercise their First Amendment freedoms. Several cases exemplify this point.

Several faculty members of Lincoln University brought suit against the university's board of trustees and the president of the university seeking judicial review of certain personnel actions or threats of personnel action which the plaintiffs allege were in retaliation for their constitutionally protected criticism of the university. Beginning approximately in 1977, the president of the university proposed a broad scale faculty retrenchment program intended to increase the student-faculty ratio from 12 to 1 to 20 to 1. This action generated substantial faculty dissent, including open verbal criticism by faculty of the president of the university, attempts by the faculty to censure at least one colleague, statements in local newspapers quoting faculty, and faculty picketing aimed at drawing attention to problems perceived by the faculty to exist at the university. Specific actions of the university's president openly contested by his faculty included original notification to all faculty that they were being terminated, subject to revocation of the termination at a later time (a part of the president's plan of retrenchment), the removal of one of the plaintiffs as chairman of the English department and his subsequent termination, the removal of another of the plaintiffs as chairman of the chemistry department, and a variety of warnings sent by the president to various faculty indicating that attempts to censure a colleague and attempts to picket might be grounds for disciplinary action, including termination.

The United States Court of Appeals for the Third Circuit held that a public university may not threaten a faculty member with dismissal or other serious personnel action, or take such action against a faculty member, solely because of that faculty member's outspoken criticism of the actions of a university president related to the security of the employment of faculty.

The court held that at least a significant amount of the speech activities engaged in by the faculty of Lincoln University in this case falls within the protection of the First Amendment, in that the activity was essentially criticism of the president of the university and his policies and methods for approaching faculty retrenchment and the continued employment of certain faculty. Although the court held that speech, including picketing, may be subject to reasonable time, place and manner restrictions, such activities may not be restrained simply upon the basis of their allegedly offensive content, especially where the threats precede, and therefore attempt to chill, the exercise of free speech.[5]

In another case, a tenured professor employed by New Mexico Highlands University, also held the position of Assistant Academic Dean and Director of Title III Programs. His contract, originally noting that he occupied probationary status, eventually provided that he was appointed for the academic year 1974-75 in "permanent" status, as "Associate Professor of History; Director of Title III, Assistant to the President for Planning and Development, at New Mexico Highlands University...." During his employment, the plaintiff became embroiled in a controversy with the president of the university concerning the administration of the Title III program. This controversy culminated in the plaintiff's appearance before the board of regents during which appearance he vehemently attacked not only the president's approach to the administration of the Title III program, but the president's predeliction to terminate the program in Chicano studies at the university. The plaintiff's statements also included expressions that the university administration was incredibly mediocre and "morally and ethically bankrupt". The president held equally significant criticisms of the professor and indicated, among other things, in a letter to certain members of the board, that he could not trust the professor and that the professor had improperly administered the Title III program, including attempts to assume virtual autonomy over the program in violation of university policy. The dispute concerning the Title III program, and the program in Chicano studies, involved a substantial number of students within the university community and included, at one point, the occupation by 45 or 50 students of the office of the president. The president placed a significant amount of responsibility for such disruptive activities upon the professor and another faculty member and so stated to at least certain members of the board of regents. At the culmination of this dispute, the president informed the professor that his contract as Assistant Academic Dean and Director of the Title III programs at the university would not be renewed for the ensuing academic year.

The professor brought suit, alleging that such action violated his rights under the First and Fourteenth Amendments and § 1983 of the Civil Rights Act. Specifically, the professor alleged that his contract afforded him tenured status in the position of Assistant Academic Dean and Director of Title III programs and that, in any event, the action taken was in retaliation for his exercise of First Amendment rights of free speech.

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[5] Trotman v. Board of Trustees of Lincoln Univ., 635 F.2d 216 (3rd Cir. 1980).

The Court of Appeals of New Mexico ruled that the professor did not have tenure in his administrative position. It also held that the nonrenewal of his administrative appointment was not violative of constitutional guarantees to freedom of expression. The court held that the tenure regulations incorporated by reference within the plaintiff's contract of employment clearly applied to faculty members in their capacity as instructors, but not as administrators. Since the plaintiff was not dismissed from his position as a member of the teaching faculty, but was retained as a tenured professor, he had no claim to tenure under the provisions of his contract or university tenure policy. The court held that even assuming the allegations concerning the plaintiff might have been personally critical, they were nonetheless communicated only to officials of the university system required to receive such information to make valid judgments concerning the operation of the system or its programs. Such communications are not public for the purposes of the invocation of the liberty interest protections of the Fourteenth Amendment.[6]

In a third significant case involving the exercise of First Amendment rights, a Dr. Mayberry was employed as an assistant professor in the Department of Romance Languages at East Carolina University. In 1971, the university began a self-study in preparation for accreditation the following year. Pursuant to the self-study, the chairman of the Department of Romance Languages established an organization and administration committee, chaired by himself and including his wife as one of its members. Mayberry criticized the composition of the committee within the department and wrote a letter complaining of his department chairman's committee appointments. He further complained to the university self-study committee and completed a questionnaire critical of his department chairman's performance.

He was subsequently notified that he would not be granted tenure. The major reason, according to the department chairman, was because of the need to reduce the size of the Spanish faculty. However, coincidental with this decision, six faculty members of the university were granted tenure, only two of whom held PhD degrees, normally a prerequisite at the university to the granting of tenure. Mayberry brought suit alleging that the denial of tenure, and his consequent dismissal (under a six-year "up or out rule") was in retaliation for his criticism of the department chairman and, therefore, an infringement of his rights under the First Amendment. The United States Court of Appeals for the Fourth Circuit held that the professor had failed to prove that the denial of tenure was indeed in retaliation for the exercise of his First Amendment rights. It concluded that the professor's case rested on no more than unsubstantiated conjecture.[7]

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[6] Lux v. Board of Regents of New Mexico Highlands Univ., 622 P.2d 266 (N.M. Ct. App. 1980).

A nontenured professor may be denied tenure if that individual does not meet the criteria for the granting of tenure regardless of an allegation of denial of First Amendment activities. Such was the case where a Michigan State University professor alleged that he was denied tenure because of his exercise of protected First Amendment rights. The United States Court of Appeals for the Sixth Circuit held that none of his rights had been violated since he would not have been granted tenure regardless of his protected activities.[8]

8.3b Alleged Discrimination

Most cases involving alleged discrimination are brought by members of a minority group. However, during the year one significant case was reported which dealt with alleged discrimination against a white female. In that case, Rhea Schwartz, a white female, informed the Florida Agricultural and Mechanical University (FAMU) of her interest in employment at the university. In 1975, after receiving her doctorate in education, she applied to the board of regents "applicant pool," seeking a teaching position within the state university system (comprised of nine universities, including FAMU, a historically black institution). Subsequently, in August, 1976, the board advertised the availability of a "permanent" tenure-earning teaching position in the area of exceptional child education at FAMU. The announcement specified that a doctorate in exceptional child education was required. The Dean of FAMU's College of Education appointed Dr. Lillie Davis as chairperson of a committee to screen applicants for the position; applicants were three in number, including Schwartz and a Mr. Thompkins, a black male.

On December 3, 1976, prior to interviewing any of the three applicants, Davis sent a memo to the Dean indicating a predisposition that Thompkins would be appointed to the position. Thompkins heard of the position on December 6 and was interviewed on December 9. He had not applied for the position, as was required, and submitted only a vita, which was filled with errors as to his employment history. Thompkins held two masters degrees, not a doctorate, and had less teaching experience than Schwartz. Indeed, it appeared from his "corrected" vita that he had less than the required five years experience. In spite of these facts, Davis recommended "on behalf of the screening committee" on December 10, that Thompkins be hired. Schwartz had yet to be interviewed for the position. Davis apparently did not check with the Dean's office regarding other applicants. Schwartz was finally interviewed on December 13, and was told, contrary to the position announcement, that the position in question was temporary. Schwartz expressed interest in being considered but Davis and other FAMU officials acted to effectuate the hiring of Thompkins.

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[7] Mayberry v. Dees, 663 F.2d 502 (4th Cir. 1981).

[8] Hildebrand v. Board of Trustees of Michigan State Univ., 622 F.2d 439 (6th Cir. 1981).

Schwartz brought suit under Title VII of the Civil Rights Act and under 42 U.S.C. § 1981, alleging that she was rejected on the basis of her race and sex. The United States District Court held that the hiring of Thompkins over Schwartz constituted discrimination against Schwartz on the basis of her race and sex. The court found that Schwartz had clearly established a prima facie case of discrimination. She was a white female seeking employment with a formerly all black institution which was operating under a mandate from the Office of Civil Rights Compliance to desegregate. The court found that the university failed to (1) show that the person hired was somehow better qualified than Schwartz or, (2) prove a nondiscriminatory reason for rejection of Schwartz by a preponderance of the evidence. The court concluded that FAMU failed to show any nondiscriminatory motive for the rejection of Schwartz; rather the evidence established that the stated reasons for preference of Thompkins (his allegedly superior qualifications) were invalid and a pretext for intentional social discrimination against Schwartz. The court ordered Schwartz hired, with retroactive back pay and awarded attorney's fees.[9]

8.3c Elimination of Tenure

During the past few years, economic conditions have forced several institutions to eliminate tenure. During the past year one significant case was reported on this topic.[10] A Mr. Knowles was employed as a professor at Unity College, beginning in 1969. He was employed under successive one year contracts. In January of 1971, the college established a tenure policy which required the president to make a determination respecting a professor's tenure before the end of his or her sixth year of employment. The faculty on tenured status could be terminated only in the case of financial emergency, in which event the college could cancel all tenure, or, because of the elimination of a faculty member's academic program or his or her unprofessional conduct. Financial exigency resulted in the college's cancellation of all tenure in June, 1971, only six months after the tenure policy was instituted.

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[9] Schwartz v. State of Florida, 494 F. Supp. 574 (N.D. Fla. 1980).

[10] Knowles v. Unity College, 429 A.2d 220 (Me. 1981).

In 1978, Knowles was notified that he would not be rehired. No formal statement of cause for nonreappointment was submitted to him. He brought action contending that his employment for more than six successive years conferred upon him tenured status, either under the college's temporary tenure policy or AAUP guidelines, which he contended the college had adopted. The Supreme Judicial Court of Maine ruled that Knowles did not have tenured status or otherwise have the right to automatic renewal of his employment contract. The court held that the college had no tenure policy except between January and June 1971. Furthermore, during the period of the college's adoption of the tenure policy, the college had the authority to revoke all tenure based upon financial exigencies. Insofar as Knowles' claim to tenure was related to the college's short-lived tenure policy, the court held that he had not acquired tenure protection in accordance with that policy either before or after its revocation. The college was therefore free to terminate his employment at the expiration of a contract term, without relating its action to financial exigency or any other condition or cause.

8.3d Reduction of Salary

Numerous cases are filed each year concerning salary consideration. One significant case was reported last year relating to reduction of salary. In that case a Ms. Keiser began her employment at Montana State University as a Professor of Home Economics and Director of the School of Home Economics. Originally employed on an annual basis, she signed, in 1977, an employment contract designating her title as School Director of the School of Home Economics. The contract specified that her employment was a twelve month period (fiscal year) as opposed to the academic year, and that her annual salary was $30,000. Although prior contracts had allocated a portion of the $30,000 to her administrative duties, the contract contained no such allocation in 1977. Pursuant to a reorganization of the college, Keiser was relieved of her administrative duties and was offered a contract, in 1978-79, as a professor of Home Economics, with continuous tenure, for the academic year at a salary of $25,000. She executed this contract under protest, claiming that she was entitled to a fiscal year appointment at the salary of $30,000.

The court reasoned that if "continuous tenure," as that term was contained in the contract, allows the university to unilaterally reduce Keiser's salary, then tenure "means little or nothing and the goal of economic security, as important as the goal of academic freedom, no longer exists." The court therefore held that the university negotiated and entered into a tenured appointment that justified Keiser's claim to a twelve-month appointment at a salary of $30,000.[11]

8.3e Confidentiality of Faculty Evaluations

One of the most publicized cases during the past year concerned the confidentiality of faculty evaluations. In that case, a female assistant professor employed by the University of Georgia sued the regents of the university, and the members of the university promotion and tenure committee, alleging that she was unlawfully denied promotion to the rank of associate professor upon the basis of her sex. Prior to trial, the plaintiff took the deposition of Professor James Dinnan, a member of the promotion and tenure committee. Among other things, plaintiff asked Dinnan how he voted on the question of her promotion. He refused to answer. The plaintiff then filed a motion, requesting the federal trial court to order Dinnan to disclose his vote. The court issued such an order, but Dinnan again refused to answer, whereupon, on the motion of the plaintiff, the court held Dinnan in contempt. Dinnan was fined and, upon his persistance in defiance of the court's order, ordered to serve a ninety day term of imprisonment.

Dinnan appealed both the order compelling his testimony and the order finding him in contempt of court, alleging that his vote was privileged, as an exercise of academic freedom, and therefore not discoverable by the plaintiff. The United States Court of Appeals for the Fifth Circuit held that a faculty member, denied promotion or tenure by a public college or university, may compel the disclosure of the vote of a member of a faculty promotion and tenure committee, in a federal lawsuit alleging that the decision against promotion or tenure was motivated by impermissible considerations of the applicant's sex, race or ethnicity. The court held, that to allow the concept of "academic freedom" to shield the tenure committee from revealing its votes, even though its decision may have nothing to do with academic consideration, would free a public institution of higher education to practice discrimination of all types. Such an application of the principle is in contravention of the public policy of the United States against discrimination based upon impermissible considerations of sex, race or ethnicity.[12]

8.4 COLLECTIVE BARGAINING

Several significant decisions were reported during the past year relating to collective bargaining on campus. One case arose at Eastern

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[11] Keiser v. State Bd. of Regents of Higher Educ., 630 P.2d 194 (Mont. 1981).

[12] *In re* Dinnan, 661 F.2d 426 (5th Cir. 1981).

Michigan University, where the AAUP served as the exclusive bargaining agent for faculty. The negotiated agreement provides that any faculty member who is not a member must pay to the AAUP a fair share of expenses incurred by the association in negotiating and administering the agreement or pay an equivalent amount into the university's general scholarship fund. The Court of Appeals of Michigan held that an "agency shop" arrangement was specifically provided for by the legislature and the nonunion employee was required to make payment in accord with the agreement.[13]

Another case concerned a rule embodied in the collective bargaining agreement between the board of trustees of the City College of Chicago and the Cook County College Teachers Union which prohibits "concurrent full-time" outside employment. The United States District Court held that the rule was not vague or overbroad, and is rationally related to legitimate state interest, and no violation of equal protection guarantees.[14]

Two cases concerned the question of unit determination. At Edinboro State College, where the Retail Clerks Union sought recognition, it was held by the Commonwealth Court of Pennsylvania that students employed part-time on a regular basis had a sufficient community of interest with full-time employees to justify their inclusion in the bargaining unit.[15]

In the other case, the Supreme Court of New Hampshire affirmed a Public Employee Labor Relations Board (PERB) determination that physical plant operations and maintenance workers at the University of New Hampshire constituted an appropriate bargaining unit.[16] The court also held that the university had not committed an unfair labor practice by refusing to negotiate pending appeal of the PERB.

8.5 STUDENTS

Like other legal issues in higher education, student litigation was prolific during the past year. All the reported cases involving students could not possibly be covered in this section; therefore, only those cases resolved by the United States Supreme Court and cases otherwise determined to be significant, because of the issues they addressed, have been included.

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[13] Eastern Michigan Univ. v. Morgan, 298 N.W.2d 886 (Mich. Ct. App. 1980).

[14] Kaufman v. Board of Trustees, Commun. College, 522 F. Supp. 90 (N.D. Ill. 1981).

[15] *In re* Employees of Student Servs., Inc., 435 A.2d 297 (Pa. Commw. Ct. 1981).

[16] *In re* University Sys. of New Hampshire, 424 A.2d 194 (N.H. 1980).

While it has been observed that "consumer" cases abound in higher education, it might be reasoned that higher education is itself a "consumable." The case law related to students this year appears to support the idea that higher education is seen as a means to an end. Access is the key word this year—access to the rights, privileges, services, and opportunities provided by higher education.

8.5a Freedom of Expression

Completion of the advanced ROTC program usually leads to a commission and employment upon graduation. Access to this program, however, was denied to a student who believed in a supremacy of the white race and had Nazi sympathies. The student claimed that denying him admission to the program violated his First Amendment rights since the decision was based on a consideration of his political and social beliefs. The Army, on the other hand, claimed that a compelling interest was being served in considering the student's beliefs. Those beliefs, the Army alleged, would negate the ability of the student to be an effective leader.

The denial of admission was upheld by the Seventh Circuit Court of Appeals. The court held that the student's beliefs, abhorrent as they are, are protected by the First Amendment. However, a substantial governmental interest may justify an infringement of those rights.

In this instance, it was found that recruiting qualified candidates as officers is a compelling interest which would justify an investigation into and a consideration of a student's beliefs. Beliefs of white supremacy and Nazi sympathies would call into question an individual's ability to obey commands where they are issued by someone considered to be socially inferior. The court also found that the student's beliefs negated his potential as an effective leader.

This case illustrates that very narrow class of cases where a citizen's admittedly protected beliefs are demonstrably incompatible with the important public office he seeks and inimical to the vital mission of the agency he would serve.[17]

Another case decided last year involved access to the campus of a private institution. Chris Schmid, a nonstudent, was arrested by institutional security officers on the Princeton University campus. Schmid was distributing political literature when he was arrested and charged with trespassing. Princeton, a private institution, had in effect rules requiring that off-campus groups, or nonstudents, must obtain permission to distribute materials on the campus. Schmid had previously been informed that his presence on campus without permission would result in his arrest for trespassing. He was subsequently convicted of the trespass.

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[17] Blameuser v. Andrews, 630 F.2d 538 (7th Cir. 1980).

Schmid appealed his conviction alleging that his conduct was protected by the First Amendment of the United States Constitution and sections of the New Jersey Constitution. The sections in the New Jersey document state that "Every person may freely speak, write and publish his sentiments on all subjects...." The university countered that being a private institution, their property was not subject to the strictures of the two constitutions.

The New Jersey Supreme Court held that Princeton was not engaged in "state action" but preferred to "stay our hand in attempting to decide the question of whether the First Amendment applies to Princeton University." Rather, the court found in favor of Schmid on the basis of the New Jersey Constitution.

The rights of speech, assembly and expression in the New Jersey Constitution "are protectable not only against governmental bodies, but under some circumstances against private persons as well...." Princeton's property was primarily devoted to free inquiry and expression. The public is generally invited to use the resources of the university. Schmid's activity did not offend the university's educational policies nor was it disruptive. This three pronged test satisfied, the court found that Princeton did in fact violate Schmid's right to expressional activity under the state constitution.[18]

8.5b Interpretation of Statutes

There are several statutes designed to protect a student's right of access to higher education. Generally, these laws prohibit discrimination on the basis of sex, race, national origin and handicap. There have been several cases reported this year involving discrimination on the basis of one or more of these criteria. One case in particular, however, involved the question of what constitutes discrimination.

Geraldine Cannon, a thirty-nine-year-old applicant to medical school, was denied admission to Northwestern University and the University of Chicago. Both institutions are private, but Cannon brought action under Title IX alleging that she was being discriminated against on the basis of her sex. Both institutions either discouraged applicants over the age of thirty or prohibited admissions of anyone over thirty unless they possessed an advanced academic degree. Cannon alleged that this policy violated Title IX because it had a disparate effect on women. The disparate effect was created because women traditionally interrupt their studies to pursue family nurturing thus making them unable to obtain advanced degrees or attend professional school prior to age thirty.

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[18] State v. Schmid, 423 A.2d 615 (N.J. 1980).

The Seventh Circuit Court of Appeals did not accept the "disparate effect" argument. While "disparate effect" was the standard initially used to show discrimination under Title VI (and thus also under Title IX, which is modeled after Title VI), that standard had changed. Since *Bakke*, the standard required has been intentional discrimination. The court therefore found no violation of Title IX even when the "disparate effect" was coupled with the fact that the universities knew of this impact while enforcing their age policy. The court said "appellant has alleged nothing more than that a facially neutral age policy had a disparate impact upon women due to the domestic role they have traditionally assumed prior to continuing their education."[19]

8.5c Rules and Regulations

Crises usually precipitate reactionary legislation. The denial of financial aid in the wake of student demonstrations of the late sixties and early seventies illustrates this point. The Iranian crisis created by the taking and holding of United States citizens as hostages also precipitated legislation in reaction to the crisis. Even individual colleges and universities passed rules and regulations designed to deny Iranian students access to postsecondary education.

The board of regents of New Mexico State University approved a rule prohibiting any student whose home government held United States citizens hostage from re-enrolling at the university until the hostages were released unharmed. A group of Iranian students challenged the rule as violative of their rights of equal protection and due process.

The regents defended the policy on financial and safety grounds. Financially, Iranian students were extended credit and if they failed to pay their bills, the regents argued that it would be unfair for New Mexico taxpayers to subsidize them. In terms of safety, the regents stated that the policy would eliminate the real possibility of violence.

Holding that the classification created by the regents rule was based on national origin and alienage, both of which are "suspect" classes, the court sought to determine if a "compelling state interest" was being served. The court found no financial justification expressed prior to passage of the rule. Minutes of the regents meeting disclosed that the reasoning given to support the rule was that people were "angry and fed up with Iranians [who] . . . shouldn't get any benefits from New Mexico taxpayers."

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[19] Cannon v. University of Chicago, 648 F.2d 1104 (7th Cir. 1981).

Several individuals did testify that a campus demonstration produced tension but no actual violence erupted. With no showing of a "clear and present" danger or actual interference with school activities the court found no basis for the safety arguments.

Since there were no compelling state interest served by the rule and since it created "suspect" classes, the court held that it violated the equal protection clause of the Fourteenth Amendment. Having found that the rule was unconstitutional on equal protection grounds, the court declined to rest its decision on any of the student's alleged due process violations. It did note, however, that serious questions regarding the student's due process rights had been raised by passage of the rule.[20]

8.5d Organizations

Access to institutional privileges accorded recognized student organizations is a subject of considerable importance. Institutions are not required to officially recognize student groups, but when they choose to do so they must treat all applicants equally.

Recent recognition cases have involved gay groups, but this year the University of New Hampshire was asked to recognize a chapter of the Collegiate Association for Research of Principles (CARP). The association was alleged to have close ties with Reverend Sun Myung Moon and the Unification Church.

The students agreed to live up to all university standards and to obey university rules. The university, however, denied official recognition to the group on the basis that it engaged in deceptive practices, did not meet the requirement that three-fourths of its members be students, and was harmful to the university. The students alleged that denial of official recognition violated their First Amendment rights.

The First Circuit Court of Appeals relied heavily on previous Supreme Court opinions in striking down the university's action. The burden of nonrecognition falls on the university. This burden can be successfully met if the group (1) advocates views directed to incite imminent lawless action and likely to incite or produce such action; (2) fails to show a willingness to comply with reasonable college rules; and (3) engages in any unlawful or disruptive activities or conduct. However, the university could not show any of these conditions to exist.

With respect to the requirement that three-fourths of the members be full-time students, the court held that the students did not have a fair opportunity at the campus "hearing" to respond to this claim.

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[20] Tayyari v. New Mexico State Univ., 495 F. Supp. 1365 (D.N.M. 1980).

Since this case was an appeal of a denial of a request for a preliminary injunction, the cause was remanded to the district court with instructions to conduct an evidentiary hearing. The purpose of the district court action would be to determine if, within the guidelines of the Supreme Court set forth in similar cases, an injunction should be issued.[21]

Official recognition of student organizations may bring the institution into the role of providing significant assistance to the organization. Institutions which are "recipients" of federal aid may not provide such assistance to organizations that discriminate. What constitutes "significant assistance" was at issue in a case involving the oldest honor society at the University of Miami. The Iron Arrow Society is a male only organization and a complaint alleged that the university was extending "significant assistance" to the group in violation of Title IX and HEW regulations.

Examples of this assistance included such things as provision of secretarial services, alumni mailings, meeting rooms, reference in the catalog to the group as the "highest recognition society for men," a monument to Iron Arrow on the campus, university acquiescence in the association of the faculty as advisors and as members of the screening committees for admission, and tapping ceremonies held on campus.

Both tangible and intangible support were held to exist in the relationship between the university and the society. The court declared that Iron Arrow could be viewed as a very valuable asset to students in terms of employment opportunities and career advancement and such benefits were completely denied to women. Thus, with the type of assistance provided to the society by the university and the fact that the benefits of the society are denied to women, the court affirmed the HEW ruling that the university was acting in violation of Title IX regulations.[22]

The society appealed the district court decision to the Fifth Circuit Court of Appeals. However, this court also found that even nontangible support qualified as "significant assistance." The court pointed out that Iron Arrow simply would not exist but for the University of Miami.[23]

8.5e Financial Matters

College attendance is expensive. States, recognizing the difficulty students experience in financing their education, have established scholarship and loan programs to provide open access to higher education for able students.

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[21] Aman v. Handler, 653 F.2d 41 (1st Cir. 1981).

[22] Iron Arrow Honor Soc'y v. Hufstedler, 499 F. Supp. 496 (S.D. Fla. 1980).

[23] Iron Arrow Honor Soc'y v. Schweiker, 652 F.2d 445 (5th Cir. 1981).

The Supreme Court of Nebraska was recently asked to rule on the constitutionality of that state's scholarship program. The Nebraska Constitution prohibits appropriations of public funds to any institution not owned by the state. The scholarship program provides funds to students attending private institutions. Nebraska's Attorney General issued an opinion that the program was unconstitutional. Several students eligible to receive funds under the program brought suit when administrators, acting on the basis of the attorney general's opinion, refused to award scholarships.

The court pointed out that the constitution was amended in 1972. The amendment changed the language from "in aid of any . . . educational institution which is not exclusively owned . . ." to "shall not be made to any school or institution...." Since funds were going to students and not "to any school or institution" the program did not offend the state's constitution.

The program was enacted in furtherance of a public purpose which is permitted by the constitution. Furthermore, the legislature had made several findings of fact related to the public benefit to be derived from the program. The court also held that gifts or credit of the state could be made to individuals in furtherance of a public purpose. If it could not, then all state welfare programs would need to be declared unconstitutional.[24]

Once enrolled, students may be asked to pay mandatory activity fees. Often students complain that they disagree with the views espoused by organizations supported by their fees. At the Camden branch of Rutgers University students challenged the activity fee they paid which went to support the New Jersey Public Interest Research Group. The organization, whose members are students throughout the state, is a politically active organization.

The university policy allows student organizations such as public interest groups, to be funded by means of mandatory fees. However, students may request a refund of the fee by returning a postcard enclosed with their term bill. The students challenged this procedure as violative of their First Amendment rights. The court did not agree.

The university can require the payment of fees for matters germane to its role as an educational institution whether students agree with the university's position or not. The refund policy provides a means whereby students are not required to support ideological positions in opposition to their own. No reprisals follow refund requests and students are not required to make any political expression or associational identification with their requests. The court not only found the policy to be constitutional but held that it was eminently in the furtherance of the values underlying the First Amendment.[25]

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[24] Lenstrom v. Thone, 311 N.W.2d 884 (Neb. 1981).

8.5f Admissions

Admissions is the basic access process in postsecondary education. A denial of admission precludes access to all of the rights, privileges, opportunities and services provided by higher education. If one is not a student, whether male or female, there can be no membership in an honor society to aid in career advancement. The practice of a profession is prohibited to those who are not graduates. Therefore, admission to an institution becomes a necessary condition for access to the benefits of a college education.

The University of California at Davis was once again the institution challenged on reverse discrimination grounds. This time, however, unlike the situation in *Bakke*, the university did not set a specific quota for minority applicants. Rather, the university used a formula for admission to the law school that combined the academic average and the LSAT score to yield a predicted freshman average. This average was then mitigated by "ethnic minority status" among other criteria. An unsuccessful, nonminority applicant challenged the procedure for admission on the basis of the equal protection provisions of the United States and the California Constitutions.

The university gave positive consideration to minority students believing that more minorities in the class would contribute a valuable cultural diversity for both students and faculty and by increasing the number of such students in the legal profession it would enhance their participation in the democratic process. There were no quotas used nor were a fixed number of spaces reserved for minorities. Several minority applicants who were accepted had lower predicted averages than the unsuccessful white candidate, but there were also several minority students who were rejected who had higher scores.

The California Supreme Court found the consideration of ethnic minority status to be only one of several factors used as admission criteria. Use of ethnic status as one factor violated neither the United States nor the California Constitutions.

The court relied heavily on the *Bakke* opinion in arriving at its decision. The Davis admissions program closely paralleled the Harvard Plan referred to by Justice Powell in *Bakke*. Justice Brennan and three other justices found a quota system to be acceptable in order to compensate for the effects of past discrimination in their *Bakke* opinions.

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[25] Galda v. Bloustein, 516 F. Supp. 1142 (D.N.J. 1981).

The Davis law school procedures did not use a quota system as approved by the Brennan opinion but merely applied race attentive criteria. Thus, the court noted that the admission procedures under consideration would "*a fortiori* . . . be sustained by those holding the Brennan view."

Thus, whether considering the Powell or Brennan opinions, the Davis procedures would on their face meet United States constitutional standards. The application of the procedures were not found to be a mere "cover" for a quota system nor were they found to have a disproportionate effect on white applicants. The court also held the admissions program to be consistent with the state constitution.[26]

A male applicant was denied access to a nursing program in Mississippi. While he could have attended other programs in the state, he wanted to pursue the training in his hometown at the Mississippi University for Women. The state claimed that they had a legitimate interest in providing the greatest possible range of educational opportunities for its female population. The unsuccessful male applicant countered by bringing suit in which he challenged the denial of admission as violative of his equal protection rights under the Fourteenth Amendment.

The Fifth Circuit Court of Appeals agreed with the applicant. Finding that the university policy was not substantially related to an important governmental interest, the court held the policy to offend the equal protection guarantees. While the state may even have a compelling interest in providing educational opportunities for its women, the court said that that interest did not stop with female citizens. Providing unique educational opportunities for females but not for males serves no substantial interest.[27]

The university was granted a rehearing but the outcome remained the same. The rehearing was based on the state's contention that Congress had provided for sex separate postsecondary institutions as an exception under Title IX. The court, however, was not persuaded by this argument. Although Congress does have enforcement powers under the Fourteenth Amendment, in its exercise of those powers it may not allow states to maintain practices which otherwise offend the constitution.[28]

As the two previous cases illustrate, access to the opportunities provided by higher education can be very important to individuals. The Supreme Court of West Virginia last year declared that a student possessed a property interest in continuing his education. The case arose when a student in the first class of the West Virginia School of Osteopathic Medicine was denied readmission after a year's medical leave of absence. The student had completed two years of the degree program with a B ± average. When he applied for readmission two months after his leave had expired, he was informed that the time for readmission had lapsed and he was no longer a student in good standing. He was told to reapply for admission. This application for readmission, supported by statements from physicians and psychiatrists, was rejected without giving any reasons.

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[26] DeRonde v. Regents of the Univ. of California, 172 Cal. Rptr. 677 (Cal. 1981).

[27] Hogan v. Mississippi Univ. for Women, 646 F.2d 1116 (5th Cir. 1981).

[28] Hogan v. Mississippi Univ. for Women, 653 F.2d 222 (5th Cir. 1981).

The court held that the student had a property right in continuing his education unless the school could show intervening circumstances which would justify a denial of continuation. The student had not forfeited any continuation rights and would be entitled to specific due process protections should the institution seek to terminate him at any time in the future. Differentiating the facts of this case from others involving the termination of students for academic reasons, the court ordered the student immediately reinstated.[29]

8.5g Athletics

Two cases were decided last year which will ultimately have a significant impact upon intercollegiate athletics. Both cases sought to bring athletic programs under the control of Title IX regulations. The cases each involved an allegation by women students that certain policies and practices of the intercollegiate athletic program discriminated against them on the basis of their sex in violation of Title IX and its implementing regulations.

Each case involved an assertion that while the athletic program did not receive direct federal financial assistance, it was covered by Title IX because it was a progam operated by a "recipient" institution. This is an "infection theory" approach. In addition, the women students alleged in each instance that the athletic programs were in fact "recipients" themselves because they benefited from federal funds provided to students under grants, work-study funding, and the use of buildings financed by federal loans.

In analyzing the cases, each court examined the language of Title IX which has been amended from "any program or activity conducted by a . . . recipient . . ." to "any educational program or activity receiving federal financial assistance." Both courts also examined the legislative history of the act. The indirect aid received by each athletic program was also examined.

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[29] Evans v. West Virginia Bd. of Regents, 271 S.E.2d 778 (W. Va. 1980).

Despite the similarity of the factual situations and the similarity of the analyses, each court was led to a different answer. A federal district court in Texas found Title IX to govern athletic programs *only if* the athletic program receives federal financial assistance.[30] However, a federal district court in Pennsylvania held that Title IX covered the athletic program at Temple University where that program did not receive federal financial assistance but was operated by a "recipient" institution.[31] Not only did the two courts differ on the "pinpoint" and "infection" theories, but they also differed in their holdings concerning the indirect aid the program received. In Texas the court found student aid and the use of buildings not to be sufficient to bring the athletic programs within the ambit of Title IX. On the other hand, the Pennsylvania court held that a similar type of assistance provided at Temple did bring the athletic program within the coverage of Title IX.

These two cases illustrate the difficulty with Title IX interpretations. Athletics now joins employment as an area where courts are struggling to bring some clarity to Title IX regulations. The ultimate resolution of these ambiguous regulations will ultimately require the counsel of the United States Supreme Court.

8.5h Religious Matters

The Supreme Court last year resolved a very basic question with respect to the rights of religious groups on campus to have access to institutional space for purposes of religious expression and worship. The case grew out of a policy at the University of Missouri at Kansas City. The university banned the use of state university buildings for regular religious services. Basing their policy on the establishment clause of the First Amendment, the university enforced the policy when an officially recognized student religious group, Cornerstone, requested permission to hold religious worship services on campus. The students alleged that denying the use of the space violated their free exercise rights under the First Amendment and also denied them their right of free speech.

The Eighth Circuit Court of Appeals held that the policy had the effect of inhibiting religion in violation of the First Amendment. The university becomes hopelessly entangled in the delicate task of defining religion and in determining whether a proposed event involves religious worship or teaching. In addition, the court found that the restriction was applied on the basis of the content of the message since other student groups were allowed access to space for their meetings.[32]

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[30] Bennett v. West Texas State Univ., 525 F. Supp. 77 (N.D. Tex. 1981).

[31] Haffer v. Temple Univ. of the Commonwealth Sys. of Higher Educ., 524 F. Supp. 531 (E.D. Pa. 1981).

[32] Chess v. Widmar, 635 F.2d 1310 (8th Cir. 1980).

The university appealed the circuit court's decision. The Supreme Court affirmed the appellate court's holding striking down the policy as a violation of First Amendment rights. The Court did point out, however, that the university could institute reasonable time, place and manner regulations concerning student groups use of campus facilities and make decisions concerning the allocation of scarce resources.[33]

8.5i Handicapped Students

The Rehabilitation Act of 1973 is designed to provide otherwise qualified handicapped persons access to educational opportunities. As stated earlier, admissions is the basic access process. In an interesting case last year, a handicapped physician was denied admission to a training program for psychiatrists. He subsequently initiated suit alleging a violation of his rights under § 504 of the Rehabilitation Act of 1973.

The applicant suffered from multiple sclerosis and was confined to a wheelchair. His disability caused serious problems with his ability to write and walk. His personal psychiatrist, however, testified that he was well qualified for the program and that he would make an unusually good psychiatrist. Based upon an interview in which it was determined that the applicant would be unable to deal emotionally with patient reaction to his disability he was denied admission.

Criteria for admission included intelligence, emotional stability, and physical stamina which the handicapped applicant possessed. These criteria were not used in evaluating the applicant, but rather the court found the interviewers had applied subjective criteria in denying admission. This was just the type of discrimination the Act was designed to eliminate.[34]

The regents of the University of Colorado appealed the decision but the Tenth Circuit affirmed. In doing so, the court pointed out that the applicant had established a prima facie case of discrimination based on his handicap. The university was then unable to prove that he was not an otherwise qualified handicapped person able to meet all of the program's requirements in spite of his handicap.[35]

Once admitted to an institution, handicapped students are eligible to participate in programs and activities for which they are qualified. A Columbia University student who was blind in his right eye attempted to participate in the university's intercollegiate football program. Even though he and his parents were willing to release the university from potential liability that might result from his participation, he was denied permission to engage in the sport.

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[33] Widmar v. Vincent, 102 S. Ct. 269 (1981).

[34] Pushkin v. Regents of the Univ. of Colorado, 504 F. Supp. 1292 (D. Colo. 1981).

[35] Pushkin v. Regents of the Univ. of Colorado, 658 F.2d 1372 (10th Cir. 1981).

The student was found to be "otherwise qualified" and to appreciate the risks associated with playing football while only partially sighted. The question raised earlier in this chapter concerning whether a program which does not receive direct federal assistance is covered by regulations designed to prohibit discrimination was also addressed by the court. It was held that where the university receives federal aid, the football program is covered by the Rehabilitation Act even where the athletic program receives no direct support from the government.[36]

This is a most interesting case since the Rehabilitation Act and Title IX are both modeled after Title IV. As stated in section 8.5g, the issue of the application of nondiscrimination legislation to athletic programs is far from being settled law. This particular case is interesting from the standpoint that it is one of the first to apply § 504 regulations to athletics.

One of the earliest issues involving handicapped students had to do with providing auxiliary aids. In most cases this means providing a sign language interpreter for hearing impaired students. The Supreme Court had an opportunity to resolve this issue last year. However, since the student had already graduated, the Court held the issue to be moot. The question of who should pay for the already provided services of the interpreter was remanded for a trial on the merits.[37]

Two other cases involving the responsibility for providing a student with a sign language interpreter were resolved with greater clarity last year. In both instances, it was held that state vocational rehabilitation service agencies were not precluded from providing interpreter services. Furthermore, it was pointed out that the legislative history of the Rehabilitation Act indicated that the bulk of such services would be paid for by state and private agencies and not by the college and universities.[38]

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[36] Wright v. Columbia Univ., 502 F. Supp. 789 (E.D. Pa. 1981).

[37] University of Texas v. Camenisch, 101 S. Ct. 1830 (1981).

[38] Jones v. Illinois Dep't of Rehabilitation Servs., 504 F. Supp. 1244 (N.D. Ill. 1981); Schornstein v. New Jersey Div. of Voc. Rehabilitation Servs., 519 F. Supp. 773 (D.N.J. 1981).

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